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Supreme Court, U.S.
FILED

071174 JAN 8 - 2008

OFFICE OF THE CLERK

No.

In The
Supreme Court Of The United States

Anthony J. Allegrino II, Petitioner,

V.

The State Bar of California, Resp.

On Petition for Writ of Certiorari To
The California Supreme Court

APPENDIX

Anthony J. Allegrino II
367 Windsor Highway, PMB 149
New Windsor, NY 12553
(914) 837-1765

Counsel for Petitioner Pro Se

Dated: March 11, 2008

LIST OF DOCUMENTS

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1.	Dec. of California Supreme Court	App. A.
2.	Dec. of State Bar of California State Bar Court Review Department	App. B
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Appendix A

BEST AVAILABLE COPY

(State Bar Court Case No. 04-0-12846)

SUPREME COURT

S154342

IN THE SUPREME COURT

OF CALIFORNIA

OCT 1 0 2007

EN BANC

Frederick K. Ohlrich Clerk

IN RE ANTHONY JOSEPH ALLEGRINO, II ON DISCIPLINE

The peition for writ of review is denied.

It is hereby ordered that Anthony Joseph Allegrino, II State Bar No. 200905 be disbarred from the practice of law and that his name be stricken from the roll of attorneys. Respondent is ordered to make restitution within 30 days

following the effective date of this order or within 30 days following the Client Security Fund (CSF) payment, whichever is later (Rules Proc. of State Bar, rule 291), to

Muhamat Kabashi in the amount of $41,500 plus 10% interest per annum from May 15, 2004, (or to the CSF to the extent of any payment from the fund to Muhamat Kabashi, plus interest and costs, in accordance with Business and Professions Code section 6140.5). Any restitution to the CSF is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d). Respondent is also ordered to comply with rule 9.20 of the California Rules of Court. and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the date this order is effective.* Costs are awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

*(See Bus. & Prof. Code, § 6126, subd. (c).)

Case No. 04-0-12846

OPINION ON REVIEW

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **ANTHONY JOSEPH ALLEGRINO, II,**
A Member of the State Bar.

In this original disciplinary proceeding, the State Bar's Office of Chief Trial Counsel (State Bar) requested review of a hearing judge's decision recommending a five-year stayed suspension and five years' probation on various conditions including actual suspension for three years and until payment of specified restitution and compliance with standard 1.4(c)(ii).1 The hearing judge determined that, in a single matter involving two clients, respondent Anthony Joseph Allegrino, II, was culpable of 19 counts of misconduct, including failing to perform competently, charging and collecting illegal and unconscionable fees,

misappropriating $40,000, making numerous misrepresentations, failing to return unearned fees, and improperly withdrawing from representation. On review, the State Bar asserts that the appropriate sanction pursuant to the standards is disbarment. Although he participated in the hearing department proceedings below, respondent failed to participate on review.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Ca1.4th 184, 207), we adopt most of the hearing judge's findings and conclusions and modify others, as more fully set forth below. However, as we discuss *post,* we determine that in order to protect the public, the courts, and the legal

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[1]The standards are found in the Rules of Procedure of the State Bar, title IV, Standards of Attorney Sanctions for Professional Misconduct. All further references to standards are to this source.

profession, maintain high professional standards, and preserve public confidence in the legal profession, disbarment is the only suitable disciplinary recommendation.

I. Significant Procedural History

Respondent was admitted to practice law on June 1, 1999. He has one prior record of discipline. In three immigration law matters, respondent was found culpable of serious misconduct, including three counts of charging and collecting unconscionable fees, failing to perform and to return unearned fees, and committing acts of moral turpitude in all three cases by making unauthorized charges to clients' credit cards and billing substantially more than the original agreed-upon flat fee. On September 28, 2005, the Supreme Court filed an order suspending respondent from the practice of law for two years and until he

complied with standard 1.4(c)(ii), execution stayed, and placing him on five years' probation with conditions including one year of actual suspension.

II. Statement of Facts

On May 5, 2004, Kujtim Gjokaj (Gjokaj), Berat Kabashi (Kabashi) and Fatmir Gashi (Gashi) were detained in Laredo, Texas, by the United States Border Patrol on charges of attempted illegal entry into the United States from Mexico. Gjokaj, Kabashi and Gashi are Albanians from Kosovo, who were seeking political asylum in the United States.' Kabashi and Gashi are cousins, and they met Gjokaj on the trip.

After he was detained, Kabashi telephoned his cousin Muhamat "Mike" Kabashi (Mike) in New York. Mike immediately began working to obtain Kabashi's and Gashi's release from

[2]Kabashi and Gashi testified that their families were persecuted by Serbian authorities because of their Albanian ethnicity. They recounted specific incidents from 1998 to 2004 when family members were jailed, beaten and/or killed. Because of their fear of persecution in Kosovo, Kabashi and Gashi sought the help of a travel network to be smuggled out of their country and eventually to Mexico. From Mexico, Kabashi, Gashi and Gjokaj waded across the Rio Grande River and were caught in the desert by the Border Patrol a few miles inside the Texas border.

custody. Their bail was set at $20,000 each. Kabashi asked Mike to telephone Gjokaj's relative, Burim Gjokaj (Burim), who also lived in New York. Mike telephoned Burim and told him about Gjokaj's arrest. On about May 6, 2004, Burim hired respondent to represent Gjokaj. Shortly thereafter, respondent flew from New York to Texas to meet with Gjokaj.

Around May 10, 2004, Kabashi was approached to serve as an interpreter between Gjokaj and respondent.[4] After his meeting with Gjokaj, respondent told Kabashi that he could obtain his and Gashi's release and a change of venue to New York where their relatives lived. Kabashi gave respondent his cousin Mike's telephone number.

About May 10, 2004, respondent called Mike to offer his services to represent Kabashi and Gashi. He proposed to post bail and file motions for a change of venue for a fee of $2,500 for each of them, plus $20,000

each for their bail. Mike told respondent that he thought the price was too high, that he already had an attorney he intended to use for the change of venue, and that he planned to post bail himself at the Immigration and Customs Enforcement (ICE) office in New York as soon as he was able to raise the funds.

Mike contacted numerous bonding companies in his effort to raise funds for bail. He obtained a trust deed on a co-operative owned by one of his brothers to post as collateral for the bail bond only to find out later that a co-operative was not acceptable collateral. Mike eventually contacted an uncle in Kosovo to seek help in finding someone with money or enough credit to pledge as collateral for the bonds. The uncle put Mike in touch with Gjon Lleshaj (Lleshaj), a

[3]Respondent lives in New York, but is not licensed to practice law in New York or Texas. Whether respondent's practice in New York, or his representation of clients in Texas, constituted the unauthorized practice of law in those jurisdictions was not pursued by the State Bar. (Rules Prof. Conduct, rule 1-300(B) [member shall not practice law in a jurisdiction where to do so would be a violation of regulations of the profession in that jurisdiction].)

[4]At the time, Kabashi spoke only limited English and could not read it at all. Gjokaj and Gashi neither spoke nor read English.

fellow Albanian who owned a construction company in Manhattan. Lleshaj agreed to lend Mike the money.[5]

On Friday, May 14, 2004, Mike drove from his residence in the White Plains area of New York to Lleshaj's Manhattan office to pick up a check for $40,000. He drove back to White Plains and deposited the $40,000 check into his bank, Sound Federal Savings Bank. Mike obtained two bank checks in the sum of $20,000 each for Kabashi's and Gashi's bail.[6] He then drove back to Manhattan to take the checks to the ICE office. Although he arrived at about 1:50 p.m., Mike was told by the ICE staff that it was too late to have the bail bonds processed that day. He was given blank applications and told to return with the completed applications and the checks on Monday, May 17, 2004.

As Mike was leaving the ICE office at about 2:10 p.m., he received a telephone call from respondent asking if he had obtained the bail money. Mike

confirmed that he had the money and related the events at the ICE office. Respondent offered to reduce his fee to represent both Kabashi and Gashi for a total of $1,500, and promised to obtain their release the following day (Saturday, May 15, 2004) if Mike deposited $41,500 in certified funds into respondent's Citibank account. That sum represented the $20,000 bail for each detainee plus $1,500 for respondent's fees to post bail and to seek a change of venue to New York.

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[5]At trial, respondent attempted to cast aspersions on Lleshaj by insinuating that he was a recently-indicted criminal. He further sought to attack the credibility of Mike, Kabashi arid Gashi by asserting that they were associated with or employed by Lleshaj for criminal purposes. The hearing judge found, and we agree, that respondent's unsupported contentions were successfully refuted by the more credible testimony of Burim and Glenn H. Bank, an experienced immigration attorney in New York who represented Lleshaj in his immigration matter and who ultimately represented Kabashi and Gashi in their asylum petitions.

[6]Mike was able to withdraw these funds the same day as the deposit because he had approximately $90,000 in a corporate account at the same bank from a recent business sale. However, the funds from the sale of the business were still under review by an accountant and could not be released for a couple of weeks.

While consulting with other attorneys, Mike had learned that a change of venue alone would cost around $1,000. He decided the extra $500 respondent was charging was worth it to secure Kabashi's and Gashi's earlier release on Saturday rather than Monday. Although Mike had misgivings about dealing with someone he did not know, the prompt release of Kabashi and Gashi induced him to retain respondent. Mike told respondent that he would require a written agreement before he deposited the funds, and directed respondent to fax the document to a travel agency Mike had recently used. Upon contacting the travel agency later that day, Mike learned that respondent's fax agreement had not arrived. When he reached respondent in Texas, respondent claimed to have already faxed the agreement, but agreed to fax it again. In one of their conversations that same day, respondent

told Mike he would bring some forms for Kabashi and Gashi to sign that were necessary for the change of venue.

On May 14, shortly after talking with Mike, respondent met with Kabashi and Gashi, and informed them that Mike had hired him to represent them. Respondent provided documents for Kabashi and Gashi to sign, asserting that they pertained to their release and the change of venue.' The men refused to sign anything until they talked with Mike. Kabashi and Gashi left the meeting room and telephoned Mike from a phone in the detention center. Mike explained that, if they agreed, he was prepared to pay respondent $1,500 to post their bail, obtain their release on Saturday, and then seek a change of venue. Kabashi and Gashi agreed to hire respondent. Believing that the papers related to the change of venue, Mike advised them to sign the papers. Kabashi and Gashi rejoined respondent, and despite being unable to read any portion of the documents other than

his own name, Kabashi signed two documents — one for himself and one on behalf of Gashi. Although Kabashi informed respondent that neither he nor Gashi could read English, respondent neither translated the documents nor explained the contents.

'Respondent also falsely stated that their bail could be between $20,000 and $50,000 because they were of the Muslim religion, and that their bail would increase the longer they were detained.

Contrary to respondent's representations, the documents Kabashi signed were not for their release or a change of venue, but, instead, were fee agreements. Other than each client's name, the two agreements were identical: three pages with no handwriting, and neither agreement was dated nor signed by respondent. The agreements provided, in relevant part, that:

(1) "All flat fees are earned immediately after

Client tenders a payment to Attorney,"

(2) "If additional work is required beyond the normal amount in a similar matter, Client agrees to pay Attorney at a rate of $325.00 Per Hour;"

(3) "Attorney Fees: _____ ;91

(4) There will be an administrative charge of no less than $295 to copy a complete case file.

Clients who owe any Attorney fees must pay the balance plus the $295.00 in order to

obtain a copy of the case file;"

"There are **No Refunds of Flat Rated Attorney Fees or Hourly Attorney's Fees Once Earned or Time Expended On Client's Legal Matter. The Non-Refundable Retainer is to ensure Attorney Availability;"**

(6) "Client grants Attorney a lien on any real, personal or intellectual property that Client has an interest in for all monies owed from this agreement;" and

(7) "Client hereby grants and conveys full release to Attorney as to any financial disputes under this Agreement and all those associated with Attorney upon the presentation of an invoice detailing charges to Client and upon Client signing such invoice acknowledging such services as rendered and correct. However, an unsigned invoice or an unjustified refusal

> to sign an invoice shall not be deemed a protest of such invoice by such Client. Additionally, after 30 days of presentment of such invoice to Client by Attorney, Client will be deemed to have ratified and accepted such invoice as if signed by such Client. Furthermore, Client hereby agrees to be limited to the remedy of arbitration, which shall be binding or nonbinding at the noncomplaining party's option, which costs shall be borne at the losing party's expense, in the event of a dispute under this Agreement in a venue mutually agreeable to both or all parties to this Agreement."

At the time Kabashi signed the documents, they did not set forth the scope of representation or a flat fee amount. This information was handwritten into the agreements later by respondent without Kabashi's, Gashi's or Mike's knowledge or consent. Specifically, respondent subsequently added the following terms and conditions: (1) under services to be performed: "Evaluate bail situation/modification if needed to obtain release from custody, if possible, and transfer case to New York District, if recommended and if needed and if possible, and prepare asylum petition, if warranted under law, and obtain asylum status, if

Needed and if possible possible and if warranted under law;" (2) under attorney fees: "$27,750;" and (3) directly above the signature line: "Invoice acknowledged as received and any and all charges reflect charges for flat fees for services rendered as agreed for flat fee of $27,750." Respondent never provided Mike with copies of these agreements.' Kabashi and Gashi did not know they were fee agreements, and never consented to the terms and conditions set forth therein.

On Saturday morning, May 15, Mike redeposited the two $20,000 checks he had previously drawn, and had a bank check issued for $40,000 payable to respondent and a separate check for $1,500 also payable to respondent. The $1,500 check bore the typed-in notation: "Legal fees at Laredo, Texas, paid in

full." Although Mike still had not received any written agreement from respondent, he nevertheless deposited the checks into respondent's account as directed because he was anxious to secure the release of Kabashi and Gashi that same day.

After depositing the money into respondent's account, Mike drove immediately to the tra el agency and found two identical faxes from respondent. In the faxes, respondent promised to "post immigration bonds" for Kabashi and Gashf upon receipt of the funds.[9] After reading the faxes, Mike telephoned respondent to tell him that the deposit had been made to his account.

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[8]The hearing judge found respondent's testimony as to the circumstances surrounding the execution of the fee agreements not to be credible. More specifically, the hearing judge determined that respondent was not credible when he contended, among other things, that his services were to be rendered for a flat

fee of $27,750 each; the fee was payment solely to reserve his time; he was retained to represent Kabashi and Gashi on May 6, 2004; he had worked over 100 hours by May 20, 2004; and the $325 per hour rate set forth in the retainer agreement was for extra work not usually included as part of the representation, and was in addition to the $27,750 flat fee to reserve his time. Conversely, the hearing judge found Mike to be a credible witness. These credibility determinations are supported by overwhelming evidence, and we thus find no reason to reject or modify them on review. (Rules Proc. of State Bar, rule 305(a) [review department gives great weight to hearing judge's findings resolving issues of credibility]; *Franklin* v. *State Bar* (1986) 41 Ca1.3d 700, 70.8.)

[9]As discussed *post*, respondent subsequently altered this document to reflect that the entire $41,500 was for attorney fees.

requested that respondent call him immediately upon the release of Kabashi and Gashi as Mike had already made their travel arrangements to New York.

That same morning, respondent checked out of his hotel in Laredo, visited Kabashi and Gashi in custody for 10 to 15 minutes, and apprised them of the deposit made on their behalf. He mentioned that he was having "some trouble with the judge," and thus, they would not be released that day as he had hoped. He further told them that he would obtain their release on Monday, May 17, 2004. However, respondent knew that he was not going to be in Texas on May 17 to secure their release because he had a mandatory court appearance in Los Angeles on that date in his prior disciplinary matter before the

State Bar Court. Later on Saturday, Kabashi told Mike that respondent had visited briefly that morning and had told them that they would not be released until Monday. After the brief meeting on May 15, 2004, respondent had no further contact with Kabashi or Gashi.

On May 17, 2004, Mike attempted unsuccessfully to reach respondent several times on his cell phone. Kabashi and Gashi were still being held in Laredo and were awaiting their release that day as respondent had promised. After respondent failed to return Mike's calls, Mike called once more, this time leaving a message that he was going to alert law enforcement unless he heard from respondent by 10 a.m. on Tuesday. On Tuesday morning, May 18, 2004, respondent called Mike and informed him that Kabashi and Gashi would be released that day and

asked him not to contact the police. He assured Mike that he was taking care of everything. However, Kabashi and Gashi were not released on May 18, 2004, and respondent stopped returning Mike's telephone calls.

On May 19, 2004, Mike filed a criminal complaint against respondent with Joseph Crispino of the New York State Police. Mike gave Crispino copies of the faxed agreement from respondent, the checks he had deposited into respondent's account, and the deposit slip for $41,500.

Crispino contacted respondent, who agreed to meet for an interview. During their discussion, respondent gave Crispino the agreement that he had altered after faxing it to Mike. The alterations included: (1) adding the words "by power of attorney" after the words "as you [Mike] are financially responsible for their case," and (2) adding the words "to handle matter - legal fees" at the end of the sentence instructing Mike to deposit $41,500. By making the second change, respondent endeavored to falsely characterize the entire $41,500 as his attorney fees. When Crispino showed respondent the fax agreement furnished by Mike, respondent alleged that he added the additional language after Mike notified him that the first fax had not been received in an effort to clarify their agreement. Mike never received a version of the agreement respondent provided to the police.

Respondent admitted to Crispino that he did not meet or know of Kabashi and Gashi until he arrived in

Laredo to represent Gjokaj around May 10, 2004. He told Crispino that he had decided to withdraw as counsel for Kabashi and Gashi on May 15, 2004, before leaving Laredo because he was unwilling to act unethically as Kabashi and Gashi had wanted.[10] Respondent also told Crispino that Kabashi and Gashi were suspected terrorists who had asked him to concoct a fraudulent basis for their asylum claims. However, Kabashi and Gashi never fully discussed with respondent the facts upon which their asylum applications would be based." Nor did Kabashi or Gashi ever ask respondent to fabricate grounds for their asylum claims. Kabashi and Gashi were never told by the authorities or respondent that they were suspected terrorists.

When Crispino questioned respondent as to why he did not return the fees when he decided to withdraw, respondent claimed that he had earned all the money. He claimed that he had performed a lot of research. However, respondent was unable to provide Crispino

[10]Respondent's remarks to Crispino are inconsistent with the billing statements respondent subsequently submitted to Mike, which indicate that he started working on the cases on May 6, 2004, and continued until May 20, 2004.

[11]Respondent had never prepared an asylum petition for any client prior to May 6, 2004.

billing sheets, research results, or any other documentation to support his claim. When respondent was asked to justify charging $41,500, respondent stated that it was a flat-rate fee and that he was entitled to it even if he only worked one hour.

As a result of Crispino's investigation, criminal charges were filed against respondent in New York for grand theft, and his bank account containing approximately $38,000 at the time was frozen. The criminal matter was still pending at the time of the hearing below.

On May 21, 2004, respondent called Mike and told him: "I told you to trust me. You did not. You went to the police, so, therefore, I quit. When I get around to it, I will send you a final bill." Sometime thereafter, Mike received from respondent a letter dated May 20, 2004, and two billing statements. In the statements, respondent represented that Kabashi and Gashi had each

paid only $20,750 of a $27,750 nonrefundable flat fee, and therefore owed him an additional $7,000 each. In the letter accompanying the statements, respondent declared that he had fulfilled his obligations under the agreements and was withdrawing from representation because: (1) Kabashi and Gashi did not have valid asylum claims; (2) they had made statements and requests necessitating withdrawal; (3) Mike had not met his financial obligations; and (4) Mike had engaged in outrageous, uncooperative and unacceptable conduct. The letter stated that the flat fee was nonrefundable. Respondent did not communicate his intent to withdraw to Kabashi or Gashi.

At the time respondent withdrew from representation, he had performed no services of value. He filed no documents on behalf of Kabashi and Gashi, and made no court appearances. He neither posted bail nor secured their release. Respondent never returned any portion of the advanced fees he was paid to

represent Kabashi and Gashi. His failure to return the $41,500 humiliated and frustrated Mike, who remains indebted to Lleshaj for that amount.

When respondent did not appear in court on Kabashi's and Gashi's behalf on May 20, 2004, they employed another lawyer from Texas who represented them at a bail reduction hearing on May 27, 2004, for a fee of $1,000 each. Kabashi's and Gashi's bail was reduced to

$4,000 each and both were released shortly after the bail reduction hearing. Mike paid for the bail and attorney fees in both cases. Glenn H. Bank (Bank) ultimately took over the cases and his flat fee for the removal proceedings, including an asylum petition and change of venue, was less than $5,000 each for Kabashi and Gashi.

III. Culpability

A. Jurisdiction

Although the misconduct in this matter occurred in Texas and New York, we have jurisdiction to regulate misconduct even when it occurred in another state. *(Einslie* v. *State Bar* (1974) 11 Ca1.3d 210.) - Although the State Bar has discretion whether to pursue allegations of alleged misconduct in other states, there is simply no jurisdictional requirement that the alleged misconduct must occur in this state in order to be prosecuted by the State Bar of California."

(In the Matter of Respondent V (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442, 447; see also Bus. & Prof. Code, § 6049.1(e) [permitting disciplinary proceedings against a California attorney based on conduct in another jurisdiction].)

B. Failure to Perform Services with Competence (Counts One and Two)

Respondent was charged in counts one and two of the Notice of Disciplinary Charges (NDC) with violating rule 3-110(A) of the Rules of Professional Conduct by intentionally,

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[1]Bank, an attorney who has practiced immigration law in New York since 1979 and who has handled 200-250 cases for people from Kosovo over the last five years, testified as an expert

in immigration practices. Based on Bank's credible testimony, the hearing judge adopted, as do we, the following findings: (1) an hourly rate of $325 exceeds the prevailing rate in immigration matters; (2) a $27,500 flat fee for representation in any immigration matter is unprecedented; (3) change of venue motions are routinely granted where, as in this case, the detainees have family living near another immigration court; and (4) Kabashi and Gashi had valid grounds for political asylum petitions based on the requirement to demonstrate subjective fear of persecution due to ethnic identity or political opinion in their home country and that such fear must be objectively reasonable.

recklessly and/or repeatedly failing to perform legal services competently.' [3] Respondent was hired to post bond to obtain Kabashi's and Gashi's release and to seek a change of venue to New York. However, he failed to post bond, file any papers, make any court appearances or take any action to obtain his clients' release or a change of venue. Respondent had only two very brief meetings with Kabashi and Gashi on May 14 and 15 during which no substantive legal issues were discussed. The hearing judge concluded, and we agree, that respondent intentionally and repeatedly failed to perform with competence by not taking any steps to resolve Kabashi's and Gashi's matters prior to withdrawing from their representation in wilful violation of rule 3- 110(A).

C. Illegal and Unconscionable Fees (Counts Three through Seven)

Rule 4-200(A) prohibits an attorney from entering into an agreement for, charging or collecting an illegal or unconscionable fee. The State Bar alleges that respondent violated this rule in five different ways by charging unconscionable fees, by collecting those fees, and by entering into an agreement for illegal fees. We agree with the hearing judge that respondent wilfully violated rule 4-200(A) by charging unconscionable fees. However, as discussed below, we dismiss count five, which alleges that respondent collected unconscionable fees, because we find that count to be inconsistent with the more serious finding that the funds were misappropriated. We also dismiss counts six and seven, which allege that respondent entered into agreements for illegal fees, finding that there were no valid or enforceable fee agreements.

1. Charging unconscionable fees

(counts three and four)

We agree with the hearing judge that respondent violated rule 4-200(A) by charging $27,750 as a flat fee ($41,500 total) for his proposed services. Our determination of unconscionability is not based on the written fee agreements respondent had Kabashi sign unknowingly, since, as we explain below, we conclude they are not valid or enforceable fee

agreements. Rather, the finding is based on respondent's repeated claim to $41,500 in fees despite the fact that he failed to perform any services of value.

In the absence of a valid fee agreement, we measure an attorney's compensation based on a theory of quantum meruit, rather than the full contract price. (*Spires* v. *American Bus Lines* (1984) 158 Cal.App.3d 211, 216.) Here, however, respondent failed to perform any services of value. He was hired to post bond and seek a change of venue. He did neither. Instead, respondent immediately left town without performing any legal work on behalf of Kabashi and Gash'. According to respondent's own testimony, his fee did not include an asylum petition, and if he decided that one was appropriate, he would charge an additional $325 an hour to prepare it. As an experienced immigration lawyer, Bank testified that a $27,000 flat

fee for representation in any immigration matter is unprecedented and incredibly high. Bank subsequently charged Kabashi and Gashi less than $5,000 each for his services, which included seeking changes of venue and preparing asylum petitions. Additionally, Mike could have hired other attorneys to resolve the venue matter for as little as $1,000. As for posting bail, Mike was prepared to handle it himself and only hired respondent because he was misled into believing that respondent could expedite their release.

"[In general, the negotiation of a fee agreement is an arm's-length transaction. [Citations.]" *(Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913.) However, the right to practice law "is not a license to mulct the unfortunate. . ." *(Recht* v. *State Bar* (1933) 218 Cal. 352, 355.) "The test is whether the fee is 'so exorbitant and wholly

disproportionate to the services performed as to shock the conscience." [Citations.]" *(Bushman* v. *State Bar* (1974) 11 Ca1.3d 558, 563.) Under the facts and circumstances of this case, respondent's claim to a flat fee of $41,500 is "so exorbitant and wholly disproportionate to the services performed as to shock the conscience."

Thus, his attempt to charge $41,500 in fees is indisputably unconscionable. Accordingly, *we* find that respondent wilfully violated rule 4-200(A) by charging unconscionable fees.

2. Collecting unconscionable fees (count five)

We decline to find that respondent also violated rule 4-200(A) by collecting the $41,500 in unconscionable fees. Collection of a fee implies consent on the part of the client to pay that fee, which consent was absent in this case. (See *Most v. State Bar* (1967) 67 Ca1.2d 589, 597 [attorney may not unilaterally determine his fee and withdraw funds held in trust for his client as payment without knowledge or consent of client].) The $40,000 collected from Mike was not intended as fees. The $40,000 was specifically intended as bail money. Respondent unilaterally decided to keep the money and claim it as his fees. Under the facts of this case, we find respondent's conversion of the bail money to fall within the purview of misappropriation rather than collection of unconscionable fees.

Accordingly, we dismiss count five with prejudice.

3. Entering into an agreement for illegal fees (counts six and seven)

Respondent argued below that the fee agreements prove his position that Kabashi and Gashi agreed to pay him $27,750 each as a flat fee for his services. However, respondent obtained the signatures on the fee agreements only by fraudulently representing to Kabashi and Gashi that the documents related to their release and change of venue. Neither Kabashi nor Gashi knew that the papers were in fact fee agreements. Furthermore, respondent added the key provisions regarding the fee amount and the scope of services after the agreements were signed. As a result, Kabashi and Gashi never knew about, and could not have agreed to, the terms and conditions of the fee agreements. It was neither their understanding nor their intent to pay a flat fee of $27,750 each. They

agreed to pay respondent $1,500 as his fee.

While fraud in the execution of a contract may result in a finding that mutual assent is lacking, it does not mean that the contract is automatically void. The rule in California, as clarified by the Supreme Court in *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Ca1.4th 394, is that fraud in the execution does not render a written contract void where the defrauded party had a reasonable opportunity to discover the real terms of the contract before signing it. Therefore, lo]ne party's misrepresentations as to the nature or character of the

writing do not negate the other party's apparent manifestation of assent, if the second party had 'reasonable opportunity to know of the character or essential terms of the proposed contract." *(Id.* at p. 423, citing Rest.2d Contracts, § 163, p. 443.) In *Rosenthal,* two plaintiffs declared they were unable to read the documents presented to them because they knew very little English and one asserted she could not read the documents because she was legally blind. The Supreme Court held that these facts, assuming they were true, deprived the plaintiffs "of a reasonable opportunity to learn the character and essential terms of the documents they signed" *(id.* at p. 428, citation omitted) and "would suffice to establish reasonable reliance for purposes of showing fraud in the execution of the agreement." *(Id.* at p. 429.) Thus,

"[a] party does not have 'a reasonable opportunity' to discover the true nature of the writing if the party is prevented from doing so by some physical or other impairment." (*Jones* v. *Adams Financial Services* (1999) 71 Cal.App.4th 831, 837 [contract void where 79-year-old woman, who was legally blind and suffered from dementia and hypothyroidism, was tricked into signing loan agreement by being told that papers merely authorized defendants to obtain payoff information on her existing mortgage].)

In the instant case, respondent clearly misrepresented the nature and character of the documents. However, as set forth in *Rosenthal* v. *Great Western Fin. Securities Corp., supra,* 14 Ca1.4th 394, the analysis does not stop with a finding of respondent's fraud. The issue is whether - the defrauded party had a "reasonable opportunity" to

learn about the nature of the document before it was signed. If the answer is in the affirmative, "such 'negligence' precludes a finding the contract is void for fraud in the execution. [Citation.]" *(Id.* at p. 423.) Here, Kabashi and Gashi were detained in custody in Texas at the time the agreements were signed. Neither of them could read English, and Kabashi's English speaking was limited. Gashi neither spoke nor read English. Despite knowing this, respondent failed to provide any translation of the documents. Kabashi and Gashi declined to sign the documents and contacted Mike, who confirmed what respondent had previously told him, i.e., the documents were for their release and change of

venue. Kabashi and Gashi had already been in custody for nine days, and respondent promised that he was going to be able to obtain their release the next day, Saturday. Respondent also told them that their bail would increase the longer they remained in custody. He repeatedly urged Kabashi and Gashi to trust him because he was their attorney. Under the circumstances, the court finds that neither Kabashi nor Gashi acted in an objectively unreasonable manner in signing the papers. Accordingly, based on respondent's fraud in the execution of the agreements, and his clients' complete lack of consent to enter into the agreements, mutual assent was lacking and the agreements are void.

Although we dismiss with prejudice counts six and seven, we find respondent's unilaterally modified written contract is evidence of overreaching, which we consider a serious factor in aggravation. (See discussionpost, § IV., A.)

D. Misappropriation of Funds (Counts Eight and Nine)

Business and Professions Code section 6106" makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is con-unitted in the course of his or her relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

We agree with the hearing judge that there is clear and convincing evidence that respondent violated section 6106 by misappropriating the $40,000 advanced for Kabashi's and Gashi's bail. We note that "an attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation." *(Baca* v. *State Bar* (1990) 52 Ca1.3d 294, 304, citing *Copren* v. *State Bar* (1944) 25 Ca1.2d 129, 134.) Rather than post bail as promised, respondent kept the money, falsely claiming it as his fees. Respondent's misappropriation of these funds

violates basic notions of honesty and endangers public confidence in the legal confession.

All further references to section are to the Business and Professions Code unless otherwise indicated

E. Moral Turpitude Based on Misrepresentations (Counts Ten through Sixteen)

Section 6106 expressly states that moral turpitude includes acts of dishonesty, and it has long been established such dishonesty includes an attorney's false or misleading statements. *(Bach* v. *State Bar* (1987) 43 Ca1.3d 848, 855; *Chefsky* v. *State Bar* (1984) 36 Ca1.3d 116, 124; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 184.) In counts ten through sixteen of the NDC, respondent was charged with seven separate counts of moral turpitude based on multiple allegations of misrepresentations.

We agree with the hearing judge that there is clear and convincing evidence that respondent made the following misrepresentations:

(1) to Mike, that he would post immigration

bonds for Kabashi and Gashi upon receipt of the funds (count ten);

(2) to Kabashi and Gashi that their bail was going to be between $20,000 and $50,000 because of their Muslim religion (count eleven);

(3) to Mike, that respondent could obtain Kabashi's and Gashi's release from custody on Saturday, May 15, if Mike deposited $41,500 into respondent's bank account immediately;

(4) to Kabashi and Gashi, that he was having trouble with the judge on their cases, but that they would be released on Monday, May 17 (count thirteen);

(5) to Mike, that Kabashi and Gashi would be released on May 18 (count fourteen);

(6) to Mike, that the reason for respondent's withdrawal from representation of Kabashi and Gashi was that they had asked him to concoct false claims for their asylum petitions (count fifteen); and

(7) to agents of the New York State Police, that Kabashi and Gashi were suspected terrorists, that they had asked respondent to concoct false claims for their asylum applications, and that he had decided to withdraw from representing them on May 15 (count sixteen). He also provided the police with a version of the agreement faxed to Mike that had been altered to allot the entire $41,500 as respondent's fees.

The hearing judge found, and we agree, that respondent knew at the time he made the representations that they were false. We adopt the hearing judge's findings, and accordingly, conclude that respondent's multiple misrepresentations are acts of dishonesty constituting moral turpitude within the meaning of section 6106. *(In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 15; *In the Matter of Teinkin* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 321, 330.)

F. Failing to Return Unearned Fees Promptly (Count Seventeen)

The hearing judge found respondent violated rule 3-700(D)(2), which requires an attorney whose employment has terminated to promptly return any part of a fee paid in advance that has not been earned.

After he withdrew as their counsel, respondent did not return the $1,500 fee paid to him to represent Kabashi and Gashi, which was unearned, as discussed above. Respondent's failure to return the unearned fee is a clear violation of rule 3-700(D)(2). However, as discussed *post*, we also find that respondent violated rule 3-700(A)(2) as charged. Since rule 3-700(A)(2) is more comprehensive and mandates compliance with rule 3-700(D)(2), we decline to find a separate violation of rule 3-700(D)(2), and dismiss with prejudice count seventeen as duplicative. *(In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. •

269, 280.)

G. Improper Withdrawal from Representation (Counts Eighteen and Nineteen)

The hearing judge found that respondent

violated rule 3-700(A)(2), which prohibits an attorney from withdrawing from employment until he has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of a client. This includes giving due notice to the client, allowing time to retain other counsel, complying with rule 3-700(D) and complying with other applicable laws and rules. We agree.

Respondent effectively withdrew from employment on May 15, 2004, when he left Texas having done nothing to seek or obtain Kabashi's and Gashi's release. Respondent never informed Kabashi and Gashi of his intent to withdraw from their representation and, indeed,

never again communicated with them after his brief initial meeting. On May 20, 2004, they had to request a continuance of the hearing in order to obtain new counsel, and as a result, they remained in custody until after May 27, 2004. Furthermore, as discussed above, respondent failed to return the unearned fee of $1,500. By not informing the clients of his intent to withdraw as their attorney and by not returning the unearned fee, respondent failed to take reasonable steps to avoid reasonably foreseeable prejudice to Kabashi and Gashi in wilful violation of rule 3-700(A)(2).

IV. Discipline

In determining the appropriate level of discipline, we consider the aggravating and mitigating factors.

A. Aggravation

Respondent has a prior record of discipline. (Std. 1.2(b)(i).) As noted *ante,* on September 28, 2005, the Supreme Court filed an order suspending respondent from the practice of law for two years and until he complied with standard 1.4(c)(ii), execution stayed, and placing him on five years' probation with conditions including one year of actual suspension. In three immigration law matters, respondent was found culpable of making unauthorized charges to clients' credit cards and billing substantially over the original agreed-upon flat fee. Discipline was imposed for three violations of rule 4-200 (charging and collecting unconscionable fees), one violation each of rule 3-100(A) (failure to perform) and rule 3-700(D)(2) (failure to return unearned fees), three violations of sections 6106 (moral turpitude, dishonesty or corruption) and two violations of section 6068, subdivision (c) (maintaining an illegal or unjust action).

No mitigating circumstances were found in the prior disciplinary matter. In aggravation, respondent committed multiple acts of misconduct. There also was significant client harm, including loss of funds, additional expenditures to participate in the fee arbitration process, the defense against an unjust lawsuit, and out-of-state travel to participate in State Bar Court proceedings. Indifference toward atonement for or rectification of the consequences of his

misconduct was also an aggravating circumstance.

Respondent failed to demonstrate remorse or recognize his wrongdoing.

In the case at hand, the hearing judge found that the misconduct in the prior matter started shortly after respondent was admitted to practice and continued into 2004, and that the misconduct in the present case took place in 2004. Based on the timing of the misconduct in both matters, the hearing judge determined that the aggravating effect of the prior discipline was diminished as it was not indicative of respondent's inability to conform to ethical norms. Thus, he .considered the totality of the findings in both cases to ascertain the appropriate discipline had the matters been brought as one case. We disagree with the hearing judge's decision to diminish the aggravating effect of the prior record of discipline. The misconduct in the instant case took

place during the trial of respondent's prior disciplinary matter. We are also very concerned about the similarities between the misconduct in the prior and current cases, particularly the charging of unconscionable fees and respondent's dishonesty. The fact that respondent was participating in 'the prior proceeding for similar misconduct should have amplified respondent's sensibilities to his ethical responsibilities. Thus, we find respondent's prior record of discipline to be a serious aggravating factor.

We adopt the hearing judge's finding that respondent committed multiple acts of wrongdoing based on our determination that respondent is culpable of 15 counts of misconduct in two client matters. (Std. 1.2(b)(ii).)

We find additional uncharged misconduct in aggravation as the result of respondent's dishonesty and overreaching of his clients, constituting additional

acts of moral turpitude in violation of section 6106. (Std. 1.2(b)(iii).) Knowing of his clients' English language limitations, respondent falsely told his clients that the documents they were signing were for their release and change of venue, concealing that they were actually fee agreements. 'The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed . . . is in a superior position to exert unique

influence over the dependent party.' [Citation.]" *(Beery* v. *State Bar* (1987) 43 Ca1.3d 802, 813.) Respondent's exploitation of his position of trust to the detriment of his vulnerable clients clearly constitutes moral turpitude within the meaning of section 6106. *(In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 243-244.)

Furthermore, as noted *ante,* "[a]lthough void for lack of mutual assent, the agreement nevertheless is strong evidence of respondent's overreaching, since it contains express provisions that are anathema to respondent's fiduciary relationship with his client, and indeed are against the public policy of this state." *(In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989.) For example, the fee agreement included a provision that the flat fee was earned immediately upon payment and was nonrefundable. Such "earned immediately"

provisions are contrary to public policy because they impair a client's "absolute" power to discharge an attorney, with or without cause. *(FSLIC v. Angell, Holmes & Lea* (9th Cir. 1988) 838 F.2d 395, 397; see also *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 923 [where fee was not a true retainer, respondent must comply with rule 3-700(D)(2) and refund any unearned fee promptly].) The objectionable nature of this type of provision is more than evident in the case at hand where respondent claims he was entitled to retain the entire $41,500 as a nonrefundable flat fee even if he worked only *one* hour. Other problematic provisions in the fee agreement that provide further evidence of respondent's overreaching include: (1) the clients are not entitled to copies of their case files until they pay any balance due on attorney fees and/or until they pay an administrative charge of no less than $295 (see *In*

the Matter of Myrdall (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 377 [return of file is mandatory and not conditional on clients' signing a substitution of attorney]); (2) respondent is granted a full release "as to any financial disputes under this Agreement and all those associated with Attorney" upon the presentation of an invoice and the invoices are deemed ratified and accepted after 30 days (see rule 3-400 [attorney must not contract with a client prospectively limiting attorney's liability to the client for the attorney's professional malpractice]); and (3) the

client agrees to be limited to the remedy of arbitration, which shall be binding or nonbinding at the noncomplaining party's option (see § 6204, subd. (a) [parties may agree in writing to be bound by arbitration *after* the fee dispute has arisen]). It is settled that an attorney-client relationship is of the highest fiduciary character and always requires utmost fidelity and fair dealing on the part of the attorney. *(Beer)'* v. *State Bar, supra,* 43 Ca1.3d at p. 813.) Here, respondent flagrantly breached his fiduciary duties to his clients through his dishonesty and overreaching — a significant factor in aggravation.

We agree with the hearing judge that respondent's misconduct significantly harmed his clients. (Std. 1.2(b)(iv).) The funds Mike borrowed to give respondent have not been refunded and he

remains indebted for those funds. Other counsel had to be retained to represent Kabashi and Gashi, incurring further expenses. Most significantly, as a result of respondent's failure to perform, Kabashi and Gashi remained in custody longer than necessary.

We also agree with the hearing judge's conclusion that respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) Respondent has shown no remorse or recognition of wrongdoing. Despite overwhelming evidence to the contrary, respondent maintains that he has not engaged in misconduct, and as of the date of the hearing below, he had not refunded the misappropriated funds or unearned fees.

Finally, we find that not only did respondent lie to Mike, his clients and the New York State Police, he

continued to provide false testimony during the State Bar Court proceedings. Disregarding the abundance of evidence in c(ntradiction, respondent testified that he entered into valid fee agreements with Kabashi and Gashi, to which Mike agreed, for a flat fee of $27,750 each. Respondent's lack of candor during the proceedings is a serious factor in aggravation. (Std. 1.2(b)(vi).)

B. Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) As in the prior disciplinary matter, respondent offered no evidence in mitigation, and based on our independent review of the record, we find none.

C. Discussion

The purposes of disciplinary proceedings and of sanctions are to protect the public, the courts and the legal profession. *(In re Silverton* (2005) 36 Ca1.4th 81, 91, quoting *In re Morse, supra* 11 Ca1.4th 184, 205, quoting std. 1.3.) In determining the appropriate level of discipline, we first consider the standards applicable to this case. While we are "not compelled to strictly follow [the standards] in every case," we look to them for guidance *(In re Young* (1989) 49
Ca1.3d 257, 267, fn. 11), and they should generally be given great weight in order to assure consistency in attorney disciplinary cases. *(In re Brown* (1995) 12

Ca1.4th 205, 220.) The standards applicable to this case are 1.7(a), 2.2(a), 2.3, 2.4(b), and 2.7. Standard 1.6(a) provides in part that "[i]f two or more acts of professional misconduct are found . . . and different sanctions are prescribed . . . the sanction imposed shall be the more or most severe of the different applicable sanctions."

The most severe sanction is found in standard 2.2(a), providing that the "[c]ulpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed.""

'Standard 1.7(a) provides that if an attorney has a prior record of discipline, the degree of discipline imposed in the current proceeding shall be greater unless the prior discipline imposed was so remote in time and the offense for which it was imposed was so minimal in severity that imposing greater discipline would be manifestly unjust.

Standard 2.3 provides that culpability of moral turpitude

and intentional dishonesty toward a court or a client shall result in actual suspension or disbarment.

Standard 2.4(b) provides that failing to perform services, which does not demonstrate a pattern of misconduct, shall result in reproval or suspension.

This case involves the misappropriation of $40,000, which is a substantial sum, and there are no compelling mitigating circumstances.

Our discipline analysis is tempered by the decisional law. A review of similar cases leads us to conclude that the three-year actual suspension recommended by the hearing judge is insufficient under the circumstances presented here. In recommending three years' actual suspension, the hearing judge cited to *In the Matter of Tindall* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 652, finding that respondent's misconduct "resulted more from his lack of understanding or recognition of his conduct measured against an attorney's duties rather than from innate venality." (*Id.* at p. 665.) The hearing judge concluded that he believes respondent can be rehabilitated by a lengthy suspension. Based on respondent's serious prior misconduct that virtually

mirrors his present widespread dishonesty and overreaching, we do not agree that the facts of this case allow for such a generous interpretation of respondent's serious misconduct. The State Bar recommends disbarment, and we agree.

The intentional misappropriation of client funds is a grievous breach of an attorney's ethical responsibilities, violates basic notions of honesty and endangers public confidence in the legal profession. In all but the most exceptional cases, it requires the imposition of the harshest discipline — i.e., disbarment. *(Grim v. State Bar* (1991) 53 Ca1.3d 21, 29.)

In *Chang* v. *State Bar* (1989) 49 Ca1.3d 114, the Supreme Court disbarred an attorney who had misappropriated $7,898.44 in attorney fees that should have been paid to the attorney's former law firm. The attorney had no record of prior discipline in approximately eight years of practice. The Supreme Court noted that the attorney had made

misrepresentations to the State Bar during its investigation of the matter and to the hearing panel that heard the proceeding. Noting that "fraudulent and contrived misrepresentations to the State Bar may perhaps constitute

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15(...continued)

Standard 2.7 provides that a violation of rule 4-200 shall result in at least a six-month actual suspension, irrespective of mitigating circumstances.

a greater offense than misappropriation," the Supreme Court ordered the attorney's disbarment. *(Id.* at p. 128, citation omitted.)

In *Kaplan* v. *State Bar* (1991) 52 Ca1.3d 1067, the Supreme Court disbarred an attorney who intentionally misappropriated $29,000 from his law firm. The attorney had been admitted to practice for 12 years at the time of his misconduct and had no prior record of discipline. Even though the attorney promptly made full restitution upon being confronted with the misappropriation and despite the existence of mitigating circumstances, which included marital stress and the terminal illness of his mother-in-law, the Supreme Court concluded that the attorney's behavior was "grievously improper" and warranted his disbarment.

In *Grim* v. *State Bar, supra,* 53 Ca1.3d 21, the Supreme Court disbarred an attorney who

misappropriated the client's share of a judgment in the amount of about $5,500 after the client had moved to another state. The attorney had been admitted to practice for 20 years prior to his misconduct in this proceeding, although he had previously received a private reproval for commingling funds by depositing approximately $960 of client funds in his general office account. The Supreme Court found that the "misappropriation. . . was not the result of carelessness or mistake; [respondent] acted deliberately and with full knowledge that the funds belonged to his client. Moreover, the evidence supports an inference that [respondent] intended to permanently deprive his client of [his] funds . . ." *(Id.* at p. 30.) The attorney presented mitigating factors, including cooperation with the State Bar and ten character witnesses. In rejecting the attorney's financial stress as a mitigating factor because it was neither unforeseeable nor beyond

his control, the Supreme Court stated: "It is precisely when the attorney's need or desire for funds is greatest that the need for public protection afforded by the rule prohibiting misappropriation is greatest. [Citations.]" (*Id.* at p. 31.)

The misconduct in the present case is as serious as in the cases discussed above, and in many ways, even more egregious. Respondent's clients were incarcerated, did not speak English, and faced deportation. Respondent is culpable of misappropriating $40,000 from these

vulnerable clients, in addition to numerous other serious acts of misconduct, including failing to provide any services of value, making misrepresentations to his clients and to the police, charging unconscionable fees, and improperly withdrawing from representation.' [6] Respondent neither acknowledges that his conduct was wrongful nor expresses any remorse for the harm that he has caused. Instead of contrition, respondent went to great lengths during his testimony to justify his behavior and deny any wrongdoing. As the Supreme Court has repeatedly noted, "deception of the State Bar may constitute an even *more serious offense* than the conduct being investigated [Citations.]." *(Franklin v. State Bar* (1986) 41 Ca1.3d 700, 712 (dis. opn. of Lucas, J.).) Respondent's dishonest testimony before the court is "misconduct of a serious nature, calling into question his fitness to practice law." *(Ibid.)* Furthermore, unlike the cases discussed above, respondent has a serious

prior record of discipline for similar misconduct. Shortly after being admitted in 1999, and continuing through the trial below, respondent has repeatedly shown his "disdain and contempt for the orderly process and rule of law and clearly demonstrate that the risk of future misconduct is great." *(In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 581.) We thus conclude that "respondent is also not a good candidate for suspension and/or probation." *(Ibid.)* Finally, not only did respondent fail to establish "the most compelling mitigating circumstances," he offered no evidence in mitigation. Consequently, there is no evidence before us to support a finding that respondent is capable of and willing to conform to the ethical responsibilities of an attorney.

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[1]These other acts of misconduct alone would justify significant discipline. *(In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725 [disbarment for moral turpitude based on charging and collecting an unconscionable fee through

extensive fraudulent billing and withdrawing disputed funds]; *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343 [one-year actual suspension for misconduct including the collection of an illegal fee for services not performed and moral turpitude for lying to his client on several occasions]; *Borre v. State Bar* (1991) 52 Ca1.3d 1047 [two years' actual suspension for deceiving the State Bar by fabricating a letter, abandoning an incarcerated client, and deceiving the client about the status of the case].)

Respondent "is not entitled to be recommended to the public as a person worthy of trust, and accordingly not entitled to continue to practice law." *(Restier v. State Bar* (1960) 53 Ca1.2d 605, 615.) As a result, we conclude that the protection of the public requires that respondent be disbarred from the practice of law in the State of California.

V.

Recommendation

We recommend that respondent Anthony J. Allegrino II be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys licensed to practice.

We further recommend that respondent make restitution within 30 days following the effective date of

the Supreme Court order in this matter or within 30 days following the Client Security Fund (CSF) payment, whichever is later (Rules Proc. of State Bar, rule 291), to Muhamat Kabashi in the amount of $41,500 plus 10% interest per annum from May 15, 2004 (or to the CSF to the extent of any payment from the fund to Muhamat Kabashi, plus interest and costs, in accordance with Business and Professions Code section 6140.5). Any restitution to the CSF is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section

6140.7 of that code and as a money judgment.

We further recommend that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court and to perform the acts specified in paragraphs (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter

Pursuant to Business and Professions Code

Order of Inactive Enrollment

Pursuant to section 6007, subdivision (c)(4), and rule 220(c) of the Rules of Procedure of the State Bar, respondent is ordered enrolled inactive. The order of

inactive enrollment is effective three days after service of this opinion.

"S/REMKE, P. J." REMKE, P.J.

We concur: EPSTEIN, J. WATAI, J.

Appendix C

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

PUBLIC MATTER FILES NOV 22 2005 STATE BAR `CLERKS OFFICE LOS ANGELES

In the Matter of	) **Case No.**
04-0-12846-RMT	
	)
ANTHONY JOSEPH ALLEGRINO, II,	) **DECISION**
	)
Member No. 200905	)
)	
A Member of the State Bar.	)

INTRODUCTION

In this disciplinary matter, Timothy G. Byer appeared for the Office of the Chief Trial Counsel of the State Bar of California ("State Bar"). Respondent Anthony Joseph Allegrino, II, represented himself in these proceedings.

After considering the evidence and the law, the court recommends, among other things, that respondent be suspended for five years and until he makes specified restitution and complies with standard 1.4(c)(ii), Rules

Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct', and that the suspension be stayed on conditions including five years' probation and actual suspension for three years and until he makes specified restitution and complies with standard 1.4(c)(ii), among other things.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Respondent was admitted to the practice of law in California on June 1, 1999, and has been a member of the State Bar at all times since.

'Future references to standard or std. are to this source.

Facts

On May 5, 2004, Kujtim Gjokaj (Gjokaj), Berat Kabashi (Berat) and Fatmir Gashi (Fatmir) were detained in Laredo, Texas, by the United States Border Patrol on charges of attempted illegal entry into the United States from Mexico. Gjokaj, Berat and Fatmir are Albanians from Kosovo. They were attempting to enter the United States to seek political asylum.

Around May 10, 2004, Berat was approached to serve as an interpreter between Gjokaj and his attorney, respondent. Respondent told Berat that he could obtain his and Fatmir's release and a change of venue to New York where their relatives lived. Berat gave respondent the telephone number for his cousin Muhamat "Mike" Kabashi (Mike) in New York.

About May 11, 2004, respondent called Mike, offering his services to represent Berat and Fatmir. He

proposed to obtain their release on bail and file motions for a change of venue for a fee of $2,500 each plus $20,000 for each detainee's bail. Mike told respondent that he had already retained an attorney for this purpose and that he did not yet have the funds to post bail for Berat and Fatmir. He told respondent that he intended to post the bonds himself at the Immigration and Customs Enforcement (ICE) office in New York as soon as he was able to raise the funds to do so.

Mike contacted many bonding companies and tried to raise the bail money. He obtained a trust deed on a co-op owned by one of his brothers which he intended to post as collateral for the bail bond only to find out later that a co-op was not acceptable collateral. He had no other options to raise the funds, so he contacted an uncle in Kosovo seeking help in finding someone with enough credit to pledge as collateral for the bonds. He put Mike in touch with Gjon Lleshaj, a fellow Albanian who was a construction executive in Manhattan, who lent him the money?

[2]Respondent attempted to cast aspersions on Lleshaj by insinuating that he was an alleged criminal, recently indicted, and on Mike, Berat and Fatmir by suggesting that they were associated or employed by him. Respondent claimed that someone known as Gjelosh Lelgaj, nicknamed Joey, as well as Alex Rudaj, also known as Sandro Rudovic, were Albanians who were indicted in New York on charges of racketeering and attempted murder, and who were present during a May 6 meeting between himself and Gjokaj's relatives, Sam and Burim.

On Friday, May 14, 2004, Mike drove into Manhattan from the White Plains area of New York where he was to pi4 trp a check for $44000. IR drove back to White Plains and obtained two bank checks in the sum of $20,000 each from Sound Federal Savings Bank in Mohegan Lake, New York. He then drove back to Mqnhattan and took the checks to ICE. Although he arrived at about 1:50 p.m., Mike was told that it was too late to have the bail bonds processed that day. He was given blank applications and was told to return with the completed applications and the checks on Monday, May 17, 2004.

While Mike was in the process of raising the bail funds, respondent continued to call him to see if he had done so. On May 14 at about 2:10 p.m., just after his unsuccessful visit to ICE, Mike received a telephone call from respondent asking if Mike had obtained the bail

money. Mike admitted that he had but noted that respondent's fees were too high and that he was skeptical of dealing with an unfamiliar attorney. Respondent told Mike that he needed to trust him and that he would reduce his fee to a total of $1,500 for representing both Berat and Fatmir. Respondent also told Mike that he could obtain their release the next day, Saturday, May 15, if Mike deposited a total of $41,500' into respondent's Citibank account. The prompt release of Berat and Fatmir on Saturday, May 15,.was one of the inducements for Mike to retain respondent.

Mike told respondent that he would require a written agreement. Mike told him to fax the document to a travel agency he knew since he did not have a fax machine himself. He later contacted the travel agency and found that respondent's fax had not arrived. He told respondent

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New York pizzeria.

Glenn H. Bank, a very experienced immigration attorney in New York who represented Berat and Fatmir in their asylum petitions, successfully refuted respondent's contentions. He represented Lleshaj in his own immigration case. To his knowledge, Lleshaj has never had criminal allegation asserted against him or has he been known as "Gjelosh Lelgaj" or the nickname "Joey." Furthermore, Burim credibly testified that those persons were not present at the May 6meeting and that respondent was retained on May 6 only to represent Kujtim.

'This amount consisted of $20,000 bail for each detainee plus $1,500 for respondent's fees. The court found Mike to be a credible witness.

to send it again. Respondent faxed Mike a one-page agreement instructing Mike to deposit the funds into respondent's account at the Mohegan Lake branch of Citibank.

During a May 14 meeting with Berat and Fatmir, respondent told them that their bail would be between $25,000 and $50,000 because they were of the Muslin religion. He also had some documents for them to sign but did not do so at this time. After this meeting, the' detainees called Mike. Mike told Berat about respondent's intention to take them the "change of venue" forms for their signature and that they should sign them. They went back and found respondent still in the meeting room. They signed the forms, which turned out to be retainer agreements. Respondent presented Berat documents for his signature without telling him that they were retainer agreements for himself and

Fatmir or what the retainer agreements said. Berat signed both retainer agreements although he was unable to read any portion of the documents other than to recognize the spelling of his name.' The two-page document had no handwriting on it and was not signed or dated by respondent. Mike had previously informed respondent that Berat could not read English. Mike and Berat believed that these documents were needed to pursue the change of venue of their cases to New York.

The retainer agreements provided, in relevant part, that:

(1) "All flat fees are earned immediately after Client tenders a payment to Attorney";

(2) "If additional work is required beyond the normal amount in a similar matter, Client agrees to pay Attorney at a rate of $325 Per Hour (sic)";

(3) "Attorney Fees: $27,750.00";

(4) "There will be an administrative charge of no less than $295 to copy a complete case file. Clients who

owe any Attorney fees must pay the balance plus the $295.00 in order to obtain a copy of the case file";

(5) "REFUNDS: There are **No Refunds of Flat Rated (sic) Attorney's Fees or Hourly Attorney's Fees Once Earned or Time Expended On Client's Legal Matter.** The Non-

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'The court does not find respondent credible in his assertion that Berat was fully familiar with the terms of the retainer agreement and that he had explained the terms to Berat. Berat spoke limited English but could not read the English language. Fatmir neither spoke nor read English.

Refundable Retainer is to ensure Attorney Availability." (Emphasis in original.);

(6) "WITHDRAWAL: Attorney may withdraw for any breach under paragraph 2 upon written notice to Client's last known address.'"

The retainer agreements did not set forth the scope of representation or the flat fee charged. These items of information were handwritten in the agreements later by respondent.6 Mike never received a copy of these agreements.

Respondent's agreement faxed to Mike promised to "post immigration bonds" for Berat and Fatmir upon receipt of the funds. On Saturday morning, May 15, Mike went to his bank, returned the checks he had previously drawn, and had a bank check drawn for $40,000 payable to respondent and a separate check in the sum of $1,500 also payable to respondent. The check for $1,500 bore the typed-in notation: "Legal fees at

Laredo, Texas, paid in full." He deposited these checks into respondent's account that same morning.

On May 15, Mike told respondent that the deposit had been made to his account and asked him to call him as soon as Berat and Fatmir had been released since Mike had already

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'Paragraph two of the retainer agreements provided that "Client shall be truthful with attorney, cooperate with Attorney, keep Attorney informed of any changes in circumstances surrounding Client's case, abide by this Agreement, pay Attorney in a timely manner, and keep Attorney informed of client's address, telephone number, and whereabouts at all times."

[6]After the agreements were signed, respondent handwrote on the forms certain terms in an attempt to claim the $41,500 Mike gave him was a true retainer for representing Berat and Fatmir. Accordingly and for reasons set forth throughout this decision, the court does not give any weight to respondent's claim that those funds were a true retainer or nonrefundable flat fee to which respondent was entitled for representing Berat and Fatmir. The court also does not find credible or give any weight to respondent's billing sheets.

The court does not find credible respondent's claims that his services were to be rendered for a flat fee. Respondent also falsely claimed that he had been retained to represent Berat and Fatmir on May 6, 2004, rather than May 14, and that the 100 hours had been consumed around May 20 (around the time Mike alerted law enforcement about respondent, which is discussed later). According to respondent, his obligation to provide services was fulfilled.

The court also does not find credible respondent's claim

that the $325 per hour rate set forth in the retainer agreement was for extra work not usually performed as part of the representation and was over and above the $27,500 flat fee for each Berat and Fatmir. He unsuccessfully contended that such additional work included the preparation of asylum petitions, even though the retainer agreements noted this as an included service.

made travel arrangements for them to New York.

That same morning, respondent checked out of his hotel in Laredo, visited Berat and Fatmir for 10 to 15 minutes in custody and told them of the deposit made on their behalf. He said that he was having "some trouble with the judge" and would not be able to get them out that day as he had hoped. He told them that they would be released on Monday, May 17. In reality, respondent knew that the detainees could not be released on Saturday because bonds were not processed on that day. He also knew that he was not going to be in Texas on May 17 because he had a court appearance on his prior disciplinary matter in the State Bar Court on that day. After this meeting, respondent took no further steps to further Berat's and Fatmir's causes before abruptly withdrawing from representation the following week without returning any of the $41,500 to

Mike. He filed no documents in Texas on behalf of the detainees or made any court appearances.

Respondent had never prepared an asylum petition prior to May 6, 2004. While in custody, Berat and Fatmir never fully discussed with respondent the facts upon which asylum applications would be based.[7] Berat never told respondent that he only wanted to come to the United States for economic opportunity. During his detention, Berat was never told that there was an allegation that he was a terrorist, as respondent later claimed.

After this May 15 meeting, respondent drove at least three hours to the airport in San Antonio, Texas, and traveled to Newark by way of Chicago. He then traveled to Los Angeles

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[7] For example, Berat had received a bullet wound in Kosovo in 2002. His family had been persecuted by Serbian authorities, including one incident in which 90-100 members of the family were rousted from their homes by the authorities and were herded together. One of Berat's cousins was pulled aside by the authorities, and, in front of everyone, including Berat, was shot. The family dispersed from their homes for

fear of further persecution. Eventually, there was an upsurge in the violence which resulted in Berat's being shot in the knee while out for an evening with friends in a car marked with the insignias of a political organization, the Democratic League of Kosovo (LDK), to which Fatmir also belonged. After that, he became more frightened and, with the help of a travel network, was smuggled out of the country and, eventually, to Mexico. He, Fatmir and Gjokaj waded across the Rio Grande and were caught in the desert by the Border Patrol a few miles inside the Texas border. Fatmir had had similar experiences in Kosovo because of his Albanian ethnicity and because some members of his family were politically active.

where he appeared before this court on May 17, 2004, to participate in the trial of his prior disciplinary matter, which will be discussed later.

Later on Saturday, May 15, Berat told Mike that respondent had visited briefly earlier that morning and had told them that they would not be released that day but, instead, on Monday, May 17.

On May 17, 2004, at about 2:00 p.m. (EST), Mike tried to speak to respondent on his cell telephone but the call transferred immediately to respondent's voicemail. Berat and Fatmir were still being held in Laredo and were awaiting their release that day as respondent promised. Respondent did not answer Mike's voicemail so Mike called him again to tell him that he was going to alert law enforcement. On Tuesday, May 18, respondent called Mike and informed him that Berat and Fatmir would be released that day

and not to proceed with a police report. He assured Mike that he was taking care of everything.

Mike waited until after 5:00 p.m. on Tuesday, May 18, to file a criminal complaint against respondent with Joseph Crispino of the New York State Police. He gave Crispino a copy of the faxed retainer agreement he had received from respondent.

Respondent made misrepresentations to Crispino by:

(1) Giving him a version of the faxed agreement with Mike that had been altered to reflect the entire deposit that Mike made into respondent's account as fees to which respondent was entitled; and

(2) Telling him that Berat and Fatmir had asked him to concoct a fraudulent basis for their respective asylum claims and that they were suspected terrorists.

As to the altered fax, respondent admitted to Crispino that he had added the additional language after Mike had contacted him to report that the first fax had not been received. The alterations were: (1) Adding

the words "by power of attorney" after the words "... as you [Mike] are financially responsible for their case" and (2) Adding the words "to handle matter - legal fees- " at the end of the sentence giving Mike instructions to deposit $41,500 by 10:00 a.m. New York time on Saturday, May 15. This addition falsely characterized all of the funds as respondent's attorney's fees.

Respondent told Crispino that he had decided to withdraw as counsel for Berat and Fatmir on May 15 before leaving Laredo. He further stated that he did not return the funds because he had earned the money, noting that it was a flat-rate fee and that he was entitled to it even if he only worked one hour. Respondent did not produce any billing sheets to Crispino.

The police filed a criminal charge against respondent for grand theft and his bank account, which contained approximately $38,000, was frozen. The matter was still pending at the time of the hearing in the instant case.

Several days later, FBI agents visited Berat and Fatmir and asked them about their reasons for entering the United States. The agents did not say anything about allegations of terrorism.

When respondent did not appear in court on Berat and Fatmir's behalf on Thursday, May 20, they employed another lawyer who represented them at a bail hearing on May 27, 2004, for fees of $1000 each. Berat was released that day on $4,000 bail. Fatmir was released on $4,000 bail on June 1, 2004. Mike paid for the bail and attorney fees.

On May 21, 2004, respondent called Mike and told him: "I told you to trust me. You did not. You went to the police, so, therefore, I quit. When I get around to it, I will send you a final bill."

Before withdrawing from representation, respondent had done nothing of value or benefit to Berat and Fatmir in furtherance of the matters in which he had been retained.

Respondent sent Mike a letter dated May 20, 2004, and two billing statements. In the statements, respondent represented that Berat and Fatmir had each paid only $20,750 of the $27,750 that respondent characterized as the nonrefundable flat fee for

representing them and that they owed an additional $7,000. In the letter accompanying the statements, respondent claimed that he was withdrawing from representation because Berat and Fatmir did not have asylum claims and had made statements and requests necessitating withdrawal' and because Mike had not met his financial obligations and engaged in outrageous, uncooperative and

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'Presumably that respondent concoct a false basis for their asylum applications.

unacceptable conduct. The letter stated that they were being charged flat, nonrefundable fees for the representation. Respondent did not communicate his intent to withdraw to Berat and Fatmir.

Respondent also did not return the unearned portion of the advanced fees he was paid to represent

Berat and Fatmir. Respondent's failure to return the $41,500 has unduly humiliated and stressed Mike who, for well over a year, has been indebted to a stranger who has ties to his family. The loan of the funds was intended to be for a short time.

Glenn H. Bank, an attorney who has practiced immigration law in New York City since 1979, credibly testified as an expert in immigration practice, procedure and fees, particularly regarding asylum petitions.[9] He asserted and the court believes, among other things, that:

(1) A detainee's bail being set at $20,000 does not indicate that he or she represents a threat nor does it invoke provisions of the USA PATRIOT Act;

(2) A letter request is sufficient to seek a bail reduction. A noticed motion is not required;

(3) Change of venue motions are routinely granted where, as here, a detainee has family living near another immigration court;

(4) An hourly rate of $325 exceeds the prevailing

rate in immigration matters, with the possible exception of large firms whose practice consists of bringing highly-skilled and specialized workers to the United States;

(5) A $27,500 flat fee for representation in any immigration matter is unprecedented. He had never heard of such a fee for an individual in New York. The fee for full removal proceedings, including an asylum petition and change of venue, was between $3500 and $4000 per person. His flat fee for preparing each of the asylum petitions for Berat and Fatmir was less than $5,000;

(6) A political asylum petition must demonstrate that the petitioner subjectively fears

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'Bank is a member of the American Immigration Lawyers Association as well as the New York City Lawyers Association Committee on Immigration and Naturalization Law. He has been approved as an expert in the United States District Court for the Southern District of New York.

persecution due to ethnic identity or political opinion in his or her home country and that such fear is objectively reasonable. He opined that Berat's and Fatmir's beliefs were reasonable. He has handled between 200 and 250 cases from people from Kosovo in the last five years ;

(7) Even before September 2004, it has been common knowledge among immigration practitioners in New York that those wishing to post bonds for **detainees** arrive early in the morning because staff is often short-handed and, therefore, **less** willing to commence the application process as the day progresses. This was common practice even before the New York ICE local rule was changed in September 2004 prohibiting bond postings after 1:00 p.m.

Banks successfully refuted all of respondent's contentions to the contrary.

Conclusions of Law

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. *(In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.)

Counts 1 and 2 - Rule of Professional Conduct' 3-110(A) (Failing to Perform Competently) Rule 3-110(A) prohibits an attorney from intentionally, recklessly or repeatedly failing to perform legal services competently.

By not taking steps in furtherance of the Berat and Fatmir matters prior to withdrawing from employment, respondent intentionally, recklessly or repeatedly did not perform competently in wilful violation of rule 3-110(A).

Counts 3 through 7 - Rule 4-200 (Illegal or Unconscionable Fee)

Rule 4-200(A) prohibits an attorney from entering into an agreement for, charging or collecting

an illegal or unconscionable fee.

Respondent wilfully violated rule 4-200(A). He charged Berat and Fatmir an unconscionable fee by charging each of them $27,750 for the services described in the retainer agreement. He entered into an agreement for an unconscionable fee by seeking an hourly fee of $325 for additional work. He collected an unconscionable fee of $41,500 from Mike on behalf

of Berat and Fatmir. He also entered into illegal fee agreements with Berat and Fatmir by including provisions that the flat fee was nonrefundable and to ensure respondent's availability; and that they were not entitled to copies of their case files until they paid any balance due on attorney fees and/or until they paid an administrative charge of no less than $295.

Counts 8 and 9- Section 6106 (Dishonesty or Moral Turpitude: Misappropriation)

Section 6106 makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

There is clear and convincing evidence that respondent violated section 6106 of the Business and

Professions Code. He misappropriated $20,000 advanced for each of Berat's and Fatmir's bail. Accordingly, he committed acts of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

Counts 10 through 16 - Section 6106 (Dishonesty or Moral Turpitude: Misrepresentation) There is clear and convincing evidence that respondent violated section 6106 of the Business and Professions Code by making the following false representations:

(1) In Berat's and Fatmir's retainer agreements, that he would post immigration bonds for them upon receipt of the funds;

(2) To Berat, Fatmir and Gjokaj, that their bail was going to be between $25,000 and $50,000 because of their Muslim religion;

(3) To Mike, that respondent could obtain Berat's and Fatmir's release from custody on Saturday, May 15, if Mike deposited $41,500 into respondent's

bank account;

(4) To Berat and Fatmir, that he was having trouble with the judge in their cases;

(5) To Berat and Fatmir, that they would be released on May 17;

(6) To Mike, that Berat and Fatmir would be released on May **18;**

(7) To Mike, that the reason for respondent's withdrawal from representing Berat and Fatmir was that they had asked him to concoct false bases for their asylum applications; and

(8) To agents of the New York State Police, that Berat and Fatmir were suspected terrorists and had asked him to concoct false bases for their asylum applications; that he had

decided to withdraw from representing them on May 15. He also provided the police with a version of the faxed agreement with Mike that had been altered to reflect the entire $41,500 deposit that Mike made into respondent's account as fees.

As to the foregoing matters, respondent knew at the time he made the representations that they were false. Accordingly, he committed acts of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

Count 17 - Rule 3-700(D)(2) (Failure to Return Unearned Fees)

Rule 3-700(D)(2) requires an attorney whose employment has terminated to promptly return any part of a fee paid in advance that has not been earned. This rule does not apply to true retainer fees paid solely for the purpose of ensuring the availability of an attorney to handle a matter.

After his employment was terminated. respondent did not return the advanced, unearned fees of $1,500 paid to him to represent Berat and Fatmir in wilful violation of rule 3-700(D)(2). **Counts 18 and 19 - Rule 3-700(A)(2) (Improper Withdrawal from Representation)**

Rule 3-700(A)(2) prohibits an attorney from withdrawing from employment until he has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of a client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D) and with other applicable laws and rules.

Respondent did not inform Berat and Fatmir of his intent to withdraw from their representation. He effectively withdrew from employment. By not informing the clients of his intent to withdraw from employment, respondent failed to take reasonable steps to avoid reasonably foreseeable prejudice to the client in wilful violation of rule 3-700(A)(2).

LEVEL OF DISCIPLINE

Aegravating Circumstances

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).)

Respondent has one prior instance of discipline. (Std. 1.2(b)(i).) In Supreme Court order no. S132789 (State Bar Court case nos. 02-0-13815, 02-0-13919 and 03-0-00065 (Cons.)),

effective October 28, 2005, discipline was imposed consisting of stayed suspension for two years and until respondent complied with standard 1.4(c)(ii); and five years' probation with conditions including one year of actual suspension. Discipline was imposed for violations, in three immigration law matters, of rules 4-200 (charging and collecting unconscionable fees), 3-100(A) (failure to perform) and 3-700(D)(2) (failure to return unearned fees) and sections 6106 (moral turpitude, dishonesty or corruption) and 6068(c) (maintaining an illegal or unjust action).

No mitigating circumstances were found in the prior disciplinary matter. In aggravation, the court found multiple acts of misconduct and significant client harm, including loss of funds, additional expenditures to participate in the fee arbitration

process, defending against an unjust lawsuit and traveling out of state to participate in State Bar Court proceedings. Indifference toward atonement for or rectification of the consequences of his misconduct was also an aggravating circumstance. The court noted that respondent did not demonstrate remorse or recognize his wrongdoing. He maintained that he had not engaged in any misconduct.

The court further notes that the misconduct in the prior matter commenced less than two and one-half years after respondent was admitted to practice law" and lasted into 2004. The misconduct in the present case took place in 2004. Accordingly, the aggravating effect of this prior discipline is diminished as it is not indicative of respondent's inability to conform to ethical norms and the court will consider the totality of the findings in both cases to ascertain what the discipline would have been had

the matters been brought as one case. *(In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.)

The court notes and is very concerned about the similarities between the misconduct in the prior and current cases, particularly the charging and collecting unconscionable fees and the moral turpitude and dishonesty. As to the latter charges, in the prior case, respondent was found culpable of making unauthorized charges to clients' credit cards and overbilling substantially over the original agreed-upon flat fee. Including both disciplinary matters, respondent's conduct

presents misconduct involving five clients during a period of about three years. Respondent's multiple acts of misconduct are an aggravating factor. • (Std. 1.2(b)(ii).)

Respondent's misconduct significantly harmed clients. (Std. 1.2(b)(iv).) Mike, Berat and Fatmir traveled from out of state to participate in these proceedings. The funds Mike borrowed to give respondent have not been refunded. Mike remains indebted for the funds he borrowed to help Berat and Fatmir. Other counsel had to be retained to represent them and further expenses incurred in that regard. Mike, Berat, Fatmir and Burim traveled to California to participate in these proceedings.

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Standard 1.2(b)(v).)

Respondent has shown no remorse or recognition of wrongdoing. He stridently maintains that he has not engaged in misconduct. Further, and more importantly, the misconduct in the instant case took place during the trial in this court of respondent's prior disciplinary matter. If nothing else, the fact that he was participating in the prior proceedings for similar misconduct should have made him be doubly cautious in dealing with Berat's and Fatmir's cases.

Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) As in the prior disciplinary matter, he offered no evidence in mitigation.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. *(Chadwick v. State Bar* (1989) 49 Ca1.3d 103, 111; *Cooper v. State*

Bar (1987) 43 Ca1.3d 1016, 1025; std. 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).) The level of discipline is progressive. (Std. 1.7(b).) The standards,

however, are guidelines from which the court may deviate in fashioning the most appropriate discipline considering all the proven facts and circumstances of a given matter. *(In re Young* (1989) 49 Ca1.3d 257, 267 (fn. 11); *Howard v. State Bar* (1990) 51 Ca1.3d 215.) They are "not mandatory 'sentences' imposed in a blind or mechanical manner." *(Gary v. State Bar* (1988) 44 Ca1.3d 820, 828.)

Standards 2.2(a), 2.3, 2.4(b), 2.7 and 2.10 apply in this matter. The most severe sanction is found at standard 2.2(a) which recommends disbarment for wilful misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or unless the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is one year actual suspension.

Respondent has been found culpable, in the

present and prior disciplinary matters, of violations, in five immigration law matters, of rules 4-200 (charging and collecting unconscionable fees), 3-100(A) (failure to perform) and 3-700(D)(2) (failure to return unearned fees) and sections 6106 (moral turpitude, dishonesty or corruption). He was also found culpable in some matters of violating section 6068(c) (maintaining an illegal or unjust action) and rule 3- 110(A). Aggravating circumstances included multiple acts of misconduct, significant client harm, lack of remorse and indifference to the consequences of misconduct. There are no mitigating circumstances.

The State Bar recommends disbarment. Respondent seeks dismissal. Considering the totality of the findings in both cases to ascertain what the discipline would have been had the matters been brought as one case, the court recommends three years of actual suspension to remain in effect until respondent makes restitution to Mike (or the Client Security Fund, if it has paid) of the $41,500 plus 10%

interest from May 15, 2004, and until he complies with standard 1.4(c)(ii).

The court notes that, as of the time of the hearing in this matter, respondent's bank account was frozen by the New York State Police and contained approximately $38,000 of Mike's money. The court will also recommend that, if the account is still frozen, respondent take all necessary steps to have those funds released to Mike forthwith, commencing upon the

effective date of the Supreme Court's order in the instant case. The court is concerned with returning as much of the funds to Mike as quickly as possible. Whether or not respondent is successful in having the funds released, it is intended that he is still personally liable to Mike for the $41,500 plus interest as more fully set forth above.

The court is offended by respondent's characterization of this matter as a billing dispute at most. He has engaged in grave misconduct that resulted in harm to Mike, Berat and Fatmir and it occurred during the trial of his prior disciplinary matter, when his sensibilities to unethical behavior should have been heightened.

Respondent charged and collected money from inexperienced, vulnerable people as payment for services in an area of law in which he had no

experience. The services were not rendered and the bail was not paid, yet he kept the money. He was dishonest in his dealings with Mike, Berat and Fatmir as well as the New York State Police. He engaged in this course of conduct while he was engaged in a trial in this court for unethical conduct in three other immigration cases. He is unable or unwilling to admit that he acted inappropriately.

However, in the instant case, respondent's misconduct resulted "more from his lack of understanding or recognition of his conduct measured against an attorney's duties rather than from innate venality." *(In the Matter of Tindall* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 652, 665.) The court believes that he can be rehabilitated by a lengthy suspension to last until he makes restitution and complies with standard 1.4(c)(ii) and with strict probation conditions. Accordingly, having considered the evidence and the law, the court so recommends as adequate to protect the public.

DISCIPLINE RECOMMENDATION

Therefore, it is recommended that respondent Anthony Joseph Allegrino, II, be suspended from the practice of law for five years and until he pays restitution to Muhamat "Mike" Kabashi (or the Client Security Fund, if it has already paid) in the amount of $41,500, plus ten per cent (10%) interest per annum, accruing from May 15, 2004, and provides satisfactory proof of such payment to the State Bar Office of Probation; and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general

law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct; that execution of that suspension be stayed, and that respondent be placed on probation for five years, with the following conditions:

1. Respondent shall be actually suspended from the practice of law for the first three years of probation and until he pays restitution to Muhamat "Mike" Kabashi (or the Client Security Fund, if it has already paid) in the amount of $41,500 plus ten per cent (10%) interest per annum, accruing from May 15,2004, and provides satisfactory proof of such payment to the State Bar Office of Probation; and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. Respondent shall take all necessary steps

to have the funds in his bank account frozen by the New York State Police released to Muhamat "Mike" Kabashi (or the Client Security Fund, if it has already paid) forthwith and shall set forth all such efforts in each quarterly report submitted to the State Bar Office of Probation as described below;

2. During the period of probation, respondent shall comply with the State Bar Act and the Rules of Professional Conduct;

3. Within ten (10) days of any change, respondent shall report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, **and** to the State Bar Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;

4. Respondent shall submit written quarterly reports to the Probation Unit on each January 10, April

10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent shall state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report shall be submitted on the next following quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due

no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period;

5. Subject to the assertion of applicable privileges, respondent shall answer fully, promptly, and truthfully, any inquiries of the State Bar Office of Probation which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein;

6. Within one (1) year of the effective date of the discipline herein, respondent shall provide to the State Bar Office of Probation satisfactory proof of attendance at a session of the Ethics School and of the Ethics School Client Trust Accounting School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149

South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session. Arrangements to attend these sessions must be made in advance by calling (213) 765- 1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE). Respondent shall not receive MCLE credit for attending Ethics School or Client Trust Accounting School. (Rule 3201, Rules of Procedure of the State Bar.).

7. Reporting requirements.

a. If respondent possesses client funds at any time during the period covered by a required quarterly report, respondent shall file with each required report a certificate from respondent and a certified public accountant or other financial professional approved by the State Bar Office of Probation, certifying that: respondent has maintained a bank account in a bank

authorized to do business in the State of California, at a branch located within the State of California, and that such account is designated as a "Trust Account" or "Client's Funds Account"; and respondent has kept and maintained the following:

i. a written ledger for each client on whose behalf funds are held that sets forth:

1. the name of such client,

2. the date, amount, and source of all funds received on behalf of such client,

3. the date, amount, payee and purpose of each disbursement made on behalf of such client, and

4. the current balance for such client;

a written journal for each client trust fund account that sets forth:

1. the name of such account,

2. the date, amount, and client affected by each debit and credit, and

3. the current balance in such account.

all bank statements and canceled checks for each client trust account; and

iv. each monthly reconciliation (balancing) of (i), (ii), and (iii) above, and if there are any differences between the monthly total

balances reflected in (i), (ii), and (iii) above, the reason for the differences, and that respondent has maintained a written journal of securities or other properties held for a client that specifies:

1. each item of security and property held;

2. the person on whose behalf the security or property is held;

3. the date of receipt of the security or property;

4. the date of distribution of the security or property; and

5. the person to whom the security or property was distributed.

b. If respondent does not possess any client funds, property or securities during the entire period covered by a report, respondent must so state under penalty of perjury in the report filed with the State Bar Office of Probation for that

reporting period. In this circumstance, respondent need not file the accountant's certificate described above.

c. The requirements of this condition are in addition to those set forth in rule 4-100, Rules of Professional Conduct;

8. Within three years of the effective date of the discipline herein, respondent shall

submit to the State Bar Office of Probation satisfactory evidence of completion of no less than four hours each of MCLE-approved courses in attorney-client relations and general legal ethics. This requirement is separate from any MCLE requirement, and respondent shall not receive MCLE credit for attending these classes. (Rule 3201, Rules of Procedure of the State Bar.).

9. The period of probation shall commence on the effective date of the order of the Supreme Court imposing discipline in this matter.

10. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for five years and until he makes restitution and until he complies with standard 1.4(c)(ii) shall be satisfied and that suspension shall be terminated.

It is further recommended that respondent take

and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, Multistate Professional Responsibility Examination Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the State Bar Office of Probation, during the period of actual suspension. **Failure to pass the** Multistate Professional Responsibility Examination **within the specified time results in actual suspension by the Review Department, without further hearing, until passage. But see rule 951(b), California Rules of Court, and rule 321(a)(1) and (3), Rules of Procedure of the State Bar.**

It is further recommended that respondent be ordered to comply with rule 955, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule, within thirty (30) and forty (40) days, respectively, from the effective date of the Supreme Court order herein. **Wilful failure to comply**

with the provisions of rule 955 may result in revocation of probation; suspension; disbarment; denial of reinstatement; conviction of contempt; or criminal conviction.

COSTS

The court recommends that costs be awarded to the State Bar pursuant to Business and

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November 22, 2005 "S/Robert M. Talcott"
Judge of the State Bar Court

STATE BAR OF CALIFORNIA

August 18, 2005

Anthony Allegrino
1001 Maggie Drive
Newburgh, New York 12550

RE: Respondent: Timothy Byer and Ron Magnuson
Case No.: 05-7402

Dear Mr. Allegrino:

Your complaint against Mr. Magnuson has been reexamined as part of the internal review process of the Office of the Chief Trial Counsel. At the same time, your concomitant complaint against Mr. Byer has been reviewed. We have examined the matter to determine whether there are grounds to conduct an investigation for forwarding to an outside Special Deputy Trial Counsel pursuant to Rule 2201 (g) of the Rules of Procedure.

The allegations arise from a discipline matter against

you **presently pending** before a State Bar Court Judge. You have alleged:

- That matter 04-0-12846 before Judge Talcott has been prosecuted "without merit."
- That Mr. Byer (and his supervisor) suppressed and falsified evidence
- Submitted false evidence
- Assisted the complainant in committing perjury
- All of which is a felony

It is also alleged that Mr. Byer intimidated a witness.

In considering whether grounds exist to conduct an investigation, the Chief Trial Counsel, or his designee is to consider both the specificity of the information received and the credibility of the source of the information.

After review of the documentation you provided, your arguments to the court, the arguments of the State Bar prosecutors, on a case still pending before the judge, it is our evaluation that there is insufficient credible evidence to warrant this matter be forwarded to a Special Deputy Trial Counsel. We disagree with you that exculpatory evidence was withheld or altered or that false evidence has been submitted against you.

In order to seek review of this decision, you must file a verified accusation against the attorney with the California Supreme Court, pursuant to rule 952, subsection (d) through (0, California Rules of Court, within 60 days of the date of this letter.

The Clerk of the Supreme Court has instructed us to advise you that no specific form is used by the Supreme Court for the filing of a verified accusation against an attorney. You may obtain specific information by contacting the Clerk's office in Los Angeles or in San Francisco. The addresses and phone numbers of the respective offices are listed below.

Please be aware that if you file a verified accusation against the attorney, the Office of the Chief Trial Counsel will only reopen its file in this matter if the California Supreme Court issues an order granting your request.

You may also wish to consult with legal counsel for advice regarding any other civil, criminal, or administrative remedies which may be available to you. You may contact your local or county bar association to obtain the names of attorneys who might assist you further in this matter.

Very truly yours,

"S/M. Gochis"
Assistant Chief Trial Counsel

CALIFORNIA CODES PENAL CODE
SECTION 132-141

132. Every person who upon any trial, proceedin

inquiry, or -investigation whatever, authorized or

permitted by law, offers in. evidence,, as genuine, or

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true, any book,-, paper, document, record, or other

instrument in writing, knowing the same to have

been forged or fraudulently altered or ante-dated, is

guilty of felony.

134. Every person guilty of preparing any false or ante-dated book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever, authorized by law, is guilty of felony.

Appendix I

noticed it. It's also described as No. 8 with particularity. And we spent a considerable length here yesterday talking about how it didn't have that caption "No bonds accepted after 1:00 P.M." He was well aware of the document I'm talking about. And Mr. Magnuson is telling him not to disclose it. That's what's happening, you know.

Ron Magnuson: Your Honor, I don't...

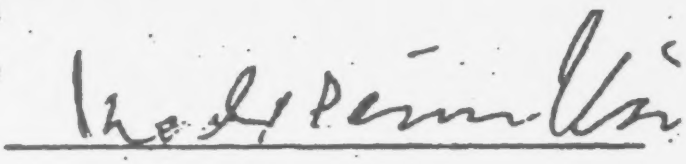
Judge Talcott: I don't believe Mr. Magnuson is advising an attorney not to

disclose a document. He would have no reason to do that.

AJA: I have an email here, from Mr. Magnuson to Mr. Byer. After court yesterday. I will be willing to show it to the court right now as an offer of proof. It's entitled "The Allegrino Evidence Problem." And it's talking about how into get altered evidence into evidence. Citing some section of the Evidence Code. And the last line says that "the alteration only becomes material when the document is offered into evidence." So I guess they can falsify whatever they want".

ATTESTATIO
N

• I, Madeleine Lewis, 2409 N.. Sepulveda #102, Manhattan Beach, California 90266, hereby state under penalty of perjury of the laws of the State of California that I have, to the best of my ability; accurately transcribed the proceeding identified on a tape



marked "State 'Bar Court, Case No. 0470-12,846r" which

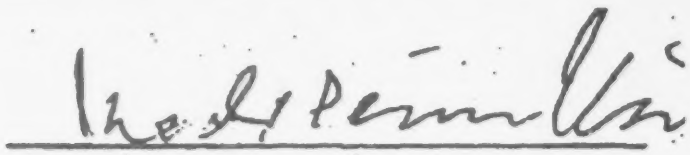
Judge Talcott: That would be the bond application without the deletion.

AJA: I did not. I didn't get anything. Mr. Byer gave- me a couple of exhibits in between running. from the conference on. the fourth' floor' up' to' see Mr. Magnuson' upstairs. He showed me, showed me, the bond Sheet that we were looking yesterday which said "No bond may be posted after one o'clock," which is the new sheet. On that new sheet was some – markings at the top

that had been whited out. I spent at least 20 minutes here yesterday identifying a document was completely in Spanish. My declaration to this court, Number 8, describes with particularity a sheet was entirely in Spanish and did not contain the word "No bonds accepted after 1:00 P.M." in Spanish. We spent twenty minutes here yesterday discussing this. He admitted he had it. He did not show me that document at all. He claims now he doesn't have it, but didn't tell me he didn't have till after he spoke with Mr. Magnuson.

ATTESTATION

I, Madeleine Lwis, 2409 N.. Sepulveda #102, Manhattan Beach, California 90266, hereby state under penalty Of perjury of the laws of the State • .of California that I have, to the best of my ability; accurately transcribed the proceeding identified on *a.* tape marked "State 'Bar Court, Case No.



AJA: Yes.

Judge Talcott: These events were occurring?

AJA: Yes. This bond sheet is the new bond sheet that went into effect September 30th, 2004. And the new bond sheet says, at the top here, "No bonds will be accepted after 100 P.M." This bond sheet was got when Mr. Byer was in New York, slipped in so that he can show it to the witness to say, "Is this the bond sheet that you got," to prove the time was one o'clock. On the top of a stack of mail that came from the State Bar with a bond sheet, which I saw at this

distance entirely _____

documents, it was a stack of documents approximately this thick, and he told me he needed 30 days to copy them, and then he claimed he never got a discovery demand from me. He said discovery was over.

Judge Talcott: Mhm.

AJA: And this is how the subject came up. So I want to go back on the record, I handwrote a note to him saying turn over to me whatever you have, including that, and give it to me, and I want it by April 30th, since you need 30 days to copy a stack of documents this thick. We came out here for the settlement conference, I asked him for the same stack of documents again, I've been talking about this document with handwriting on it for the past couple of weeks, and he keeps saying

it doesn't exist and he's not turning it over.

Judge Talcott: all right?

Is there such a document that is referred to?

Timothy Byer: In the course of our conversation before this...

Judge Talcott: Is there a document?

Timothy Byer: It is the document that is produced.

Judge Talcott: But is your handwriting on the top of that?

Timothy Byer: Originally yes. And this was improper. I apolcgize. It was nothing

_____ other than

Judge Talcott: What are you going to tell me.

Why are you...

AJA: There was a fax lying at the top from the witness who faxed it to me.

Judge Talcott: And what did you do?

Timothy Byer: And I whited the fax line out just to use the...

Judge Talcott: Why did you white it out?

Timothy Byer: Just to clean it up as an exhibit. There was nothing... There was nothing there to hide.

AJA: Judge...

I know, but we don't know that and you can't

_____ documents.

Timothy Byer: Well, I will go back and see if I can find the versions from which 4 whited out, you know, "To Tim Byer from Mohamed Kabashi" and the fax line from his restaurant. And I'll

be happy to provide it, if I can. I apologize, I should not have done it that way but that's how I did it.

Judge Talcott: Well, you can't take a document and change it in any way and then offer that as evidence.

AJA: Judge, if I may...

Judge Talcott: And if a document has a fax line or something on it or it has a filing stamp, you know, like a filing stamp and you don't like the filing stamp, you can't white those things out. I mean, where does that come from?

Timothy Byer: I'm sorry, Your Honor. I just... It...

Judge Talcott: he listened to everything you had to say
had to say.

AJA: I'm sorry...

Judge Talcott: I'm not going to have...

AJA: I waited my turn.

Judge Talcott: I'm not going to have crazy conduct.

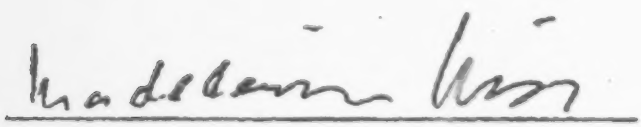
AJA; There is no crazy conduct. I just...

Judge Talcott: All right, well, just relax. You're...

AJA: He just admitted that he fabricated a piece of evidence. He altered a piece of evidence. This is my key piece of... This is an exculpatory piece of evidence. This is very severe, because what it proves is, he obtained his new bond sheet so he could show it to the witness to prove that the...

ATTESTATION

I, Madeleine Lewis, 2409 N. Sepulveda #102, Manhattan Beach, California 90266, hereby state under penalty of perjury of the laws of the State of California that I have, to the best of my ability, accurately transcribed the proceeding identified on a tape marked "State Bar Court, Case No. 04-0-12846," which hearing was held ...May 3, 2005, as marked on the tape.



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AJA: I'm just bringing it to the Court's attention.

Judge Talcott: All right. So you've brought it to my attention.

AJA: It goes to prosecutorial misconduct.

Judge Talcott: Well, there hasn't been any in this court yet. I mean, this is...

AJA: He's just admitted that he changed the document.

Judge Talcott: Yeah, I...

AJA: And I filed a discovery demand, which was not complied with, and when I filed my declaration stating that he had a United States Supreme

Court Brady v. Maryland duty to disclose the stuff, I identified the documents. Just two minutes ago he denied the existence of this document. Now he's admitted it to the Court. Before the Court, I asked him and he said that he didn't have it. He said that I was imagining it. "I can't explain what you saw." Now he's just admitted. .I mean, you know...

Judge Talcott: All right. Let's...

Mr. Byer, you're walking on thin ice. You could lose this case very, very easily if you do not

comply with your obligation to attorney, and by the Supreme Court ruling. It is absolutely established that you are under ongoing obligation to turn over exculpatory material to Mr. Allegrino. If you don't do that, and if you misinterpret the document, since in your mind it's not exculpatory, and it turns out that it is, then sanctions could be made against you as an attorney. You understand that?

Timothy Byer: I understand that, and, Your Honor, there

is nothing that is at issue...

Judge Talcott: But you can't make that statement because it's viewed through your eyes. You thought there was nothing wrong with whiting out something from a document. You can't do that. I mean, where were you educated? Where were you trained? • I mean, people go to jail for that. So I just don't think it's terribly material whether you whited that out or not, but you can't do that.

Timothy Byer: I understand that, Your Honor. I...

Judge Talcott: • so when you say to me you don't have anything, I have to look at that with jaundiced eye, because I don't know that.

Judge Talcott: You're making that judgment realistically. If

you don't take it

properly, then your case in jeopardy.

Timothy Byer: Okay. I understand that.

Judge Talcott: Well, I don't know that you do understand it.

You keep saying you understood it. Well, I

understand it... You just stood there

two minutes ago...

Timothy Byer: I didn't...I didn't understand, Your Honor,

truthfully, and...

Judge Talcot: Well, why don't you understand it?

That's...

Timothy Byer: Your Honor, if I may finish my responses. All

right. When I tell you I understand it, it is a refinement of my education, I'm receiving in this courtroom. If it was something that I should have understood before and didn't, that's my fault and I will take that up with my supervisor immediately upon leaving this hearing. And if there is any further information in that regard, I will bring it back to you whichever way it goes.

Judge Talcott: I don't understand What that last statement means. What are you going to bring back? Is there a document that you haven't turned - over?

Timothy Byer: No, no, I'm going to bring that. I've

Already told this Court that I will make an effort to find that document.

Judge Talcott: I that. I'm talking about... Certainly

that.

But, you

know, I'm not going to be happy

At all if you have a document in your possession that Mr. Allegrino. wants and believes is helpful to him, that my instruction to you to turn it over.' If you have a document - not that he could go on a fishing expedition and say,. "Give me every document you have, from whatever source you received it and I'll look at it and I'll make the decision" - You make that decision. But if you're wrong, then there is a consequence for being wrong. So I'm... to veer on the side of caution and turn over the

document that he's requested. Because if you can identify a document that he wants, then you see that he gets it.

Attestation: I, Madeline Lewis, hereby state under penalty of perjury of the laws of the State of California that I have, to the best of my ability, accurately transcribed the proceeding identified on a tape marked "State Bar Court, Case No. 04-O-

12846," which hearing was held on May 3, 2005, as marked on the tape. ("S/MADELINE LEWIS")

Hearing of May 5, 2005

AJA: Yes. Second point...

Judge Talcott: you're talking about Brady V. Maryland.

AJA: Yes Brady V. Maryland exactly Second point, Judge, you asked us to stipulate to facts yesterday. And during this meeting with Mr. Byer we went downstairs and we had an agreement when I left. Well, I received a fax at my. hotel yesterday, which is not the agreement that we had. He minced words. I then came in to day and got a second version of the

stipulation, where he added some stuff we didn't agree to. Now, I asked him to see his notes, because when we had made the agreement and it was all settled, he wrote down what was stipulated to. In his own handwriting, we went through all the documents, the jail records from Texas, and he stipulated to the visits and the times. It was only a couple of things we stipulated to, and he took notes. So I received a version one, which is untrue, version two, which is untrue, and I just asked him to see his notes so we could see what we decided

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to, and he said, "You're not entitled to *see* my notes." Well, if that reflects the agreement, a prosecutor has made an agreement for stipulation, then certainly that prosecutor, should honor the stipulation. It was all settled when I left here the other day, and now we're still arguing about what was stipulated to. He's got it in writing in hist notes. So...

Judge Talcott: Well, the court is not here as a referee in your dispute. This is Something that you should be able to work. .Now, one way of working it out is

for you to draft a 'stipulation as you understood it.

AJA: Judge, he took the notes. He gave me his word. He s the prosecutor. We're all gentlemen here. He is intentionally misrepresenting what the stipulation is that's my point to the court.

Judge Talcott: Take it up with Mr. Byer.

AJA: I have.

Judge Talcott: And if he's not willing to accede to that, then there is not a stipulation.

ATTESTATION

I, Madeleine Lewis, 2404 N.. Sepulveda #102, Manhattan Beach, California 90266. hereby state under penalty Of perjury of the laws of the State ofCalifornia that I have, to the best of my ability; accurately transcribed the proceeding identified on a tape marked "State Bar Court, Case" "S/MADELINE LEWIS" 5/5/05

AJA: I would also like him to identify the fax number for this Pasta Cuccina. If he can do that.

Timothy Byer: 914 788 7882.

You ordered that _____

Timothy Byer: It's one digit different than the phone number and I called the witness at that number many, many times.

Judge Talcott: Did you get that?

AJA: Yes, Judge. 788 7882.

Judge Talcott: All right.

AJA: Aside from the withholding of the exculpatory evidence, I would just like to point out to the Court, just so

the Court is aware. He just pointed out that he narrowed

his discovery demand

from 324

interrogatories down to 26. The Court committed 35. He made me go through a whole motion citing complex issues so the court could cut it down to 35 and he could ask 26. Okay, for what purpose? Then he dragged me to New York, after I told him...

Juge Talcott: I read your documents. really I did. I know that...

AJA: I just wanted...

I, Madeline Lewis, of Manhattan Beach, California 90266, hereby state under penalty of perjury of the laws of the State of California. that I have, to the best of my ability, accurately transcribed the proceeding Identified on a tape marked "State Bar Court, Case No. 04-0-12846," which hearing was held on May 3,

2005, as marked on the tape.

MR. BAYER: Well, Mr... Mr. Allegrino has, uh, uh, served a subpoena...civil subpoena for my personal appearance in production of the, uh, documents and things at the trial. Um, he has not served it, uh, with, uh, in conformity with the rules, but that's a issue for Your Honor to address later. Um, he has addre-...he has, uh, attached a letter, uh, dealing with a resolution to our discovery issue, um, that we addressed in our telephone and status conference back in March.. .mid-March. Uh, he has attached illy letter to him proposing that we stipulate to, uh, certain exhibits and to certain facts, um, which I have not heard back from him on. And, uh, he has also...I guess this is a second copy... no this is another, uh, civil subpoena on myself. The first one that I referred to was for documents. This one is for my personal appearance and for documents. Uh, is.. .this includes an amendment to the pretrial statement listing additional witness, and that is myself. There is nothing in here about Mr. Lelcaj. Um, and then there's a declaration by Mr. Allegrino dealing with, uh, his purported, uh, um, what he purports is, uh, my failure to comply with discovery. Um, none of this, although it was faxed this morning._ I'm sorry. It was faxed yesterday, and I received it this morning. None of this has, uh, any of the additional witness information that.. .that he said is on its way by FedEx. I think, uh, despite the, urn, inconvenience of, uhi, compiling it all

and meeting again, uh, tomorrow or another day, it would be very helpful to have this information, uh, in front of us when we.. .when we go through.. .get ready for the trial.

JUDGE: I'm going to take a look at my calendar

and see if,

uh, I can't, uh,

conduct another one of these. Oh, thank you.

Can you be out here

tomorrow by one-thirty?

MR. ALLEGRINO: Yes.

JUDGE: All right. Then, uh, uh, I'll order another

continuing, uh, pretrial conference for one-thirty

on Tuesday, the third of May. All right?

MR. ALLEGRINO: Okay. Thanks for your time.

JUDGE: Yeah, but I'm not hanging up yet.

I'm not hanging up.

I'm just giving you notice, uh, that you're to be here

tomorrow, May third, at one-thirty, Courtroom C in

Los Angeles.

MR. ALLEGRINO: Okay.

JUDGE: All right. Uh, May third at one-thirty. All right. Uh, go ahead, Mr. Bayer.

MR. BAYER: • There were some...

JUDGE: And please, uh, uh, you know, you can't serve documents by fax in this court. You know that.

DECLARATION.

I, Julie Cremeans, do hereby declare and certify under penalty of perjury that I have transcribed one CD, covering a total of 14 pages numbered 1-14, provided to me by Anthony Allegrino, labeled "Anthony Allegrino — 04-0-12846 — Copy — 5-2-05", and that the foregoing pages constitute a true, complete, and accurate transcription of aforementioned CD to the best of my ability. I hereby ceitify that I am a disinterested party in this máttcrandhavenó interest in the outcome of this meeting.

Dated this 5th day of May 2004 at Torrance, California.

near that arbitration. They all backed out of it. I didn't have to offer it. Mr. Kabachi was never my client. I bent the rules and f said fine, okay? I've done my damndest to settle this whole thing. He's got dirty witnesses and he doesn't want them anywhere near this proceeding. And that's

why I want to question him. The dirty witnesses identified by that check he withheld. The other issue is this missing piece of evidence.

Judge Talcott: I'm not inclined to allow you to call Mr. Byer as a witness. , This is not... If you have a complaint against Mr. Byer for misconduct...

AJA: Yes, I do.

Judge Talcott: File it.

AJA: I

Judge Talcott: Not in this court but with the State Bar.

AJA: Maybe Mr. Byer should recuse himself from this proceeding. Then I can call him as a witness.

Judge Talcott: That's up to Mr. Byer. But in terms of spending the time of this court outside of the parameters of the notice of disciplinary

I, Madeleine Lewis, 2409 N. Sepulveda #102, Manhattan Beach, California 90266, hereby state under penalty of perjury of the laws of the State of California that I have, to the best of my ability, accurately transcribed the proceeding identified on a tape marked "State Bar Court, Case No. 04-0-12846," which hearing was held on

May 3, 2005, as marked on the tape.

"S/MADELINE
LEWIS"
5/5/05

Today's date is May the 5th, 2005.

Judge Talcott: Good morning, everyone. Please be seated. This is the matter of Anthony *J.* **Allegrino** II, this is 2004-0-Case 12846. Counsels, please state your names for the record.

Timothy Byer: Timothy Byer for the Office of the Chief Trial Counsel.

Ronald Magnuson: Ronald Magnuson for the Office of the Chief Trial Counsel.

A J A: Anthony Allegrino for Anthony Allegrino.

Judge Talcott: It's Cinco de Mayo day today.

Timothy Byer; It's not quite the festive nature of the holiday, but I do want to bring to the court's attention a

few more details concerning our last discussion. Since we spoke at the last hearing, I told the court that I would make a search for the bond application that had the fax transmittal line and the "To Tim" from " where I whited it out from that I'd given Mr. Allegrino. I did find them and I did give that to him. That was a four-page, one of the pages was a duplicate, so it was a three-page application. I gave him all four

pages. I also had cleaned up a dirty fax so that when I say dirt, with some extraneous dot markings to make ' it look more presentable, as well as a fax transmittal line and a "To Tim - Byer" at my New York hOtel room also been whited out from that. And I found that original and gave that original to Mr. Allegrino as ell. It is now one of the State Bar's exhibits. It is a copy of the check that I had given to him at the last hearing that I realized after the hearing was also realized after the hearing was also one of the documents I cleaned up. I also made a search for another document, which turned out to be two documents, that I also whited out the fax transmittal line off of. I don't have those but I believe they are in the court's original document file as State Bar Exhibits 11 and 12. These are silent petitions and motions for change of venue, prepared by Glenn Banks for Bark Kabashi and Satmir Gashi. The Bark's papers are Exhibit 11 and Satmir's papers are Exhibit 12. I wanted to

bring this to the court's attention *so there* wasn't any issue

about further alterations such as it is.

Judge Talcott: With respect to Exhibits 11 and 12, are you suggesting that they have some markings on then, or don't have markings on them.

Timothy Byer: The court's copy is the original fax that I received, with the white-out tape at the top edge

taking off the fax transmittal from Mr. Banks' office in New York. I did not submit a copy of that white-od'd exhibit to the court. .I submitted the one that I put the white-out tape on. So Mr.

Allegrino and the other exhibit books, binders, have nothing at that top line. The court has the original with the whited out obscuring the fax transmittal line.

Judge Talcott: I'm looking at Exhibit 7. And I'm looking at the top of this exhibit to see if anything is whited out. There is no whiteout strip as it appears. Now, I may be looking in the wrong place. I'm going to *ask* counsel to approach the bench and take a

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look and find what's wrong with it. Exhibit 11.

Timothy Byer: I don't know why it's not on Exhibit 11 but 'I definitely did it on Exhibit 12.

Judge Talcott: There has not been any change or alteration to Exhibit-11-.

Timothy Byer: Your Honor, I don't know. I thought I did the same thing to Exhibit 11 but I may not have done that. So I may have just altered the fax and another original.

Judge Talcott: So is Mr. Banks going to be here as a witness?

Timothy Byer: Yes, absolutely. I put whiteout on Exhibit 12.

Judge Talcott; And what do you claim is under that if I were to see that?

Timothy Byer: Just "Law Office Glenn H. Banks" and his New York fax address and the page number of the fax.

Judge Talcott: This awfully short for this amount of information.

Timothy Byer: Your Honor, the letters are small and they. run across the top edge.

ATTESTATION

I, Madeleine Lewis, 2409 N. Sepulveda 41102, Manhattan Beach, California 90266, hereby state under penalty of perjury of the laws of the State of California that I have, to the best of my ability, accurately transcribed the proceeding identified on a tape marked "State Bar Court, Case No. 04-0-12846,"

which hearing was held on May 5, 2005, as marked on the tape. ('S?MADELINE LEWIS') 5/5/05

Fearing of May 5, 2005

Ron Magnuson; Well, Your Honor, of I may address this, first of all, part of the reason that I'm here is to make sure the court understands that if the court believes that anybody here has done anybody here has done anything wrong...

Judge Talcott: No, I thought _____

Ron Magnuson: The court should direct its all its comments to me because I'm the one that directed that this be done. Hell, I've been doing this for years but never had a problem from state courts to federal courts.

Judge Talcott; _____

Timothy Byer: Now that's beside the point, Your

Honor.

AJA: Judge, I'm outraged.

Ron Magnuson: First of all, Exhibit 9. I asked Mr. Byer to cure that document, because it's relevant

to his. Not that it says anything in particular, but that it demonstrate in general the kind of information that Mr. Kabashi would have had to provide at the time he went to the bond office and he filled this out. And then there is also a piece of evidence that says that after three

o'clock they won't accept these anymore. Now; it came as a total surprise to us that the document had been changed, if it had been, at some time, to have the thing say that no bonds will be accepted after one o'clock.- We asked . Kabashi..

First óf all, Mr. Kabashi, when we asked for him to send us the document to use for that purpose, said he didn't have it anymore because, since *he* didn't have to fill it out, he threw it away.

Timothy Byer: I don't remember if he threw it away or gave it... If it's in Detective Crispino's file, then he gave it to Investigator Crispin°. I don't remember

Ron Magnuson;

At any rate, I directed Mr. Byer to have him get another one because the relevance, however slight, the relevance is not really anything that's is on the document but ,what the requirements what the requirements are that necessity based on take some time to sit down to sit down, fill it out

and then go stand in some line. Corroboratio Bridge testimony that when he wen there a few minutes before tw o'clock or something like that, that he was told they could no process it that day because _they were out of-time

Judge Talcott: So you're offering Exhibit 9, but it's clearly not the document that Was in use at the time Kabachi actually went down there. To have the court draw the conclusion that it contained certain requirements. But why would the court do that when it doesn't know whether it was changed from what was in

existence two months earlier or three months earlier, whtever it is, or a year earlier. I

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mean, you're offering a document that had no relevance unless you could show that it really duplicated, except in minor

• respects, the document that you relied upon?

Ron Magnuson: Well, I think that M. Kabashi could so testify that this document appears to ask for the very same information that the document that he got in May of 2004. But anyway...

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Timothy Byer: Your Honor, if I may just briefly. We did, I did not know at the time that I included it among my exhibits that it was gotten by Mr. Kabashi so long after the fact.

Judge Talcott: I understand that. You know something? The court is not even suggesting that you sat there and decided you're going to keep evidence from the respondent. The court is more concerned with the fact that, in the court exhibit you don't alter documents because you never can get, you can't substitute your judgment for what the other

• side might consider important in

Explaining that document.

The very source of the document might be significant. All right?

Ron Magnuson; All right. I understand that, Your Honor, and I...

Judge Talcott: No, I'm the _____

Ron Magnuson: ...in court.

Judge Talcott: So that's where we are. And so if it potentially can be material, and Mr. Allegrino has made an argument that the source of the document is material, he

is entitled to *see* the document in pristine form as it existed when it was received.

I mean, any more than you

That is you wouldn't take a white-out on the printed page, white out something "This isn't important to this case, i'm just go to white that out." I mean, that doesn't happen in real life. All right, so where are we? Exhibit 9 has been withdrawn.

Ron Magnuson: Yes, Sir.

Judge Talcott: So very, purposes for which you want to use it you're going to have to get that in otherwise. With respect to Exhibit 11, the court doesn't see any alteration, so I have no problem with that. With respect to Exhibit 12, clearly all of us here today· have seen the little whiteout strip on various pages, and...

AJA: Judge; may I be heard?

Judge Talcott: When the 'court is done. And I'm not sure how to deal with it. I supposed if it could be held up to the light and we could *see* what it says on there, and I'm not going to do that right now, it would mean taking

• I, Madeleine Lewis, 2409 N. Sepulveda #102, Manhattan Beach, California 90266, hereby state under penalty of perjury of the laws of the State of California that I have, to the best of my ability, accurately transcribed the proceeding identified on a tape marked "State Bar Court, Case No. 04-0-12846," which hearing was held on May 5, 2005, as marked on the tape.

"S/MADELINE LEWIS" 5/5/05

STATE BAR COURT OF CALIFORNIA
Case No. 04-0-12846
Transcribed May 5, 2005

Timothy Byer: But let me clarify further. I did not know, or didn't remember, at the time that I had that with me on what date Mr. Kabashi said he got it. I asked him that question last week belatedly. I said the bond application you faxed to me, when did you get that? Did you get around the time of these events or recently? He said about a month ago. I had no... I don't have and I never had a bond application that came from the time period that clearly the statement about nothing after 1:00 P.M. would be dynamite had that been on a bond application from the time period in question. But I was never offered

that and I have no evidence of what was at the time.

Judge Talcott: Well obviously the form that is Exhibit 9 was not in existence at the time that these events occurred. AJA: that way.

Judge Talcott: I don't think you have to be concerned about that. Secondly, I'm not sure of the materiality and the relevance in significant way of whether they stop taking bonds after one o'clock or they stop taking

showed Mr. Allegrino. I have never had anything in Spanish. I don't know what he's talking about.

Judge Talcott: It is very peculiar that Mr. Allegrino has described with some particularity
document that was at the deposition.

Timothy Byer: Your Honor, we took the deposition in
the office of an immigration practitioner in
New York.
I don't know if the document he

is

referring to was on the table somewhere

and it was not part of my stack of documents. I don't remember any such

document. I don't remember seeing it, I

certainly have no idea what he's referring to.

AJA: Judge, I witnessed him remove it from the

It was in a FedEx envelope. It was on top. I noticedthis. I witnessed

him remove it from the FedEx

envelope

from the State Bar and included stuff I

had submitted to him and other

exhibits from Mr. Kabashi and it was

placed right on top

• of the table. That document was on top, on top of all the other documents. That's how I noticed it. Otherwise I would not have

I, Madeleine Lewis, 2409 N. Sepulveda #102, Manhattan

best of my ability, accurately transcribed the proceeding identified on a tape marked "State Bar Court, Case No. 04-0-12846," "S/MADELINE LEWIS" 5/5/05

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Appendix J

Case 3:06-cv-05490-MJJ Document 78 Filed 10/23/2006 Page 1 of 1

Appendix J

Case 3:06-cv-05490-MJJ Document 78 Filed 10/23/2006 Page 1 of 1

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. CV 06-05490 MJJ

AMENDED CLERK'S NOTICE

ANTHONY J. ALLEGRINO II

V.

STATE BAR OF CALIFORNIA Defendant.

Default is entered as to defendants City of Los Angeles, Los Angeles Police Department, and William Bratton on October 23, 2006.
"S/SHELIA RASH" Clerk

Dated: October 23, 2006

INTRODUCTION

Pending before the Court are four motions in these two related matters.

Three motions pertain to Case No. 06-05490: (1) Defendants Justices of the California Supreme Court and Chief Justice Ronald M. George's Motion to Dismiss (Docket No. 57); and (2) Defendants State Bar of California, Ronald Magnuson, and Timothy Byer's Motion to Dismiss (Docket No. 55), and (3) Plaintiff Anthony J. Allegrino II's Motion for Preliminary Injunction (Docket No. 49) Oppositions and replies have been filed in connection with all three motions.

A fourth motion pertains to related Case No. 07-00301: a Motion to Dismiss brought by Defendants State Bar of California, Alan Bloom, Jill A. Sperber, Aren Werchick, Pat McElroy, Timothy G. Byer, and Ronald E. Magnuson. (Docket No. 3.) Plaintiff has not filed a separate opposition to the

this motion.

Oral argument in this matter took place on April 10, 2007. On May 4, 2007, Plaintiff filed a supplemental declaration providing additional evidentiary materials, which this Court has reviewed and

FACTUAL BACKGROUND

Mr. Allegrino's federal complaints filed in both Case No. 06-05490 and Case No. 07-00301 center around two disciplinary actions taken against Plaintiff by the State Bar of California and the California Supreme Court.

The first disciplinary proceeding, S.B.C. No. 02-0-13815, resulted in a recommendation to the California Supreme Court that Mr. Allegrino be suspended from the practice of law for five years, stayed on conditions of a five-year probationary period, a one-year actual suspension, and until Mr. Al legrino could demonstrate rehabilitation and fitness. Mr. Allegrino sought review of the recommendation with the California Supreme Court, claiming that the State Bar committed several due process violations, including conspiracy, falsification of evidence, perjury, witness tampering, prosecutorial misconduct, and fraud. The Supreme Court denied Mr. Allegrino's Petition, and instituted the recommended suspension. On October 28, 2006, Allegrino concluded his

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one-year suspension and was reinstated to active status with the State Bar. Allegrino's actual suspension was lifted even though he had not yet complied with the other conditions of his disciplinary order. On September 6, 2006, the State Bar Court granted Allegrino's request for an extension of time to pay costs and make restitution. On January 5, 2007, the California Supreme Court modified its probation order to reflect the same.

The second disciplinary proceeding, S.B.C. No. 04-0-12846, resulted in a recommendation from the State Bar Court Hearing Department tat Mr. Allegrino be suspended for five years, stayed on conditions of a five-year probationary period and a three-year actual suspension. The Office of the Chief Trial Counsel for the State Bar thereafter sought review of the recommendation with the State Bar Court Review Department. On April 18, 2007, the Review Department issued an opinion recommending the disbarment of Plaintiff, a more severe discipline than the hearing judge had originally recommended.

Mr. AIlegrino was also involved in an arbitration proceeding with a former client over a fee dispute, in which the client was awarded a refund. When the client sought enforcement of the award with the State Bar's Office of Mandatory Fee Arbitration, the State Bar filed a motion with the State Bar Court to place Allegrino on involuntary inactive status. Before the hearing on the matter, Mr. A llegrino

paid the outstanding debt owed to the client and the State Bar withdrew the motion.

On September 7, 2006, Mr. Allegrino filed his complaint in Case No. C06-05490 against the State Bar of California, the City of Los Angeles, Timothy G. Byer, Ronald Magnuson, the City of Los Angeles Police Department, Chief of the Los Angeles Police Department, William Bratton; Chief Justice of the California Supreme Court Ronald M. George; and the Justices of the California Supreme Court.

Mr. Allegrino alleges that the defendants engaged in prosecutorial misconduct, conspired against him, violated his federal civil rights and state constitutional rights, and otherwise committed numerous tortuous wrongdoings.

On January 17, 2007, Mr. Allegrino filed his complaint in Case No. C07-00301 against the State Bar of California, Alan Bloom, Jill A. Sperber, Arne Werchick, Pat McElroy, Timothy G. Byer, Ronald E. Magnuson, and Arild Rossavik. In this matter, Mr. Allegrino brings claims alleging misconduct relating to the State Bar Court proceedings

to enforce the arbitration award.' Mr. Allegrino alleges that the defendants engaged in prosecutorial misconduct and otherwise conspired against him and forced him to pay the fee arbitration award or face suspension.

In both actions, Mr. Allegrino seeks both monetary and injunctive relief.

LEGAL STANDARD

A. Rule 12(b)(1)

Rule 12(b)(1) of the Federal Rules of Civil Procedure authorizes a party to move to dismiss a claim for lack of subject matter jurisdiction. Federal courts are courts of limited jurisdiction; thus, the Court presumes lack of jurisdiction, and the party seeks to invoke the court's jurisdiction bears the burden of proving that subject matter jurisdiction exists. *See Kokkonen v. Guardian Life Ins. Co.*, 22 U.S. 375, 377 (1994). A party challenging the court's jurisdiction under Rule 12(b)(1) may do so by raising either a facial attack or a factual attack. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

A facial attack is one where "the challenger

asserts that the allegations contained in a complaint are '5 insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer,* 373 F.3d 1035,

Plaintiffs Complaint in C07-0030 I rehashes many

of the factual allegations regarding his two state

bar disciplinary proceedings that were contained in

his C06-05490 Complaint, and also names three of

the same defendants. At oral

argument. Defendant clarified that his claims in

C07-00301 relate solely to improper conduct in

connection with the fee arbitration proceeding,

but that he included the overlapping factual

allegations to provide the Court with context.

1039 (9th Cir. 2004). In evaluating a facial attack to jurisdiction, the Court must accept the factual allegations in plaintiffs complaint as true. *See Miranda v. Reno,* 238 F.3d 1156, 1157 n. 1 (9th Cir. 3 2001). For a factual attack, in contrast, the Court may consider extrinsic evidence. *See Roberts v. Corrothers,* 812 F.2d 1173, 1177 (9th Cir.1987). Further, the court does not have to assume the truthfulness of the allegations, and may resolve any factual disputes. *See White,* 227 F.3d at 1242.

Thus, "[o]nce the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or evidence properly before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage v. Glendale Union High Sch.,* 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

B. Rule 12(b)(6)

A motion to dismiss pursuant to Rule 12(b)
the Federal Rules of Civil Procedure tests t
legal sufficiency of a claim. *Navarro v. Bi*
250 F.3d 729, 732 (9th Cir. 2001).
. motion is on the legal sufficiency, rather than the '

17 *See SmileCare Dental Group v. Delta D*
Plan of Cal., Inc., 88 F.3d 780, 782 (9th Ci
1996);

18 *Balisteri v. Pacifica Police Dep't*, 901 F
696, 699 (9th Cir. 1988); *Robertson v. Dea*
Witter

19 *Reynolds, Inc.*, 749 F.2d 530, 534 (9th C
1984). Further, dismissal is appropriate on
it appears

20 beyond a doubt that the plaintiff can pr

no set of facts in support of a claim. *See Abramson v.*

21 *Brownstein*, 897 F.2d 389, 391 (9th Cir. 1

In considering a Rule 12(b)(6) motion, the C accepts

22 the plaintiffs material allegations in the complaint as true and construes them in the most favorable

23 to the plaintiff. *See Shwartz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000).

ANALYSIS

A. Grounds Asserted In The Motions Dismiss.

In Case No. C06-05490, the Justices of the California Supreme Court, and Ronald M. George,

Chief Justice of the California Supreme Co (collectively "Supreme Court Justices"), wh sued

solely in their official capacities, move to dismiss on several theories. First, they arg that they are

immune from liability for Plaintiff's § 1983 claims

Eleventh Amendment. Second, they argue that they are not "persons" for purposes of § 1983 liability. Third, they argue that they are protected from Plaintiffs claims by judicial immunity. Fourth they argue that the Court lacks jurisdiction over this matter under the *Rooker-Feldman* Doctrine. Fi they contend that dismissal is appropriate under *Younger* abstention doctrine.

Also in Case No. C06-05490, the State Bar of Calif Magnuson (who is sued in both his official and individual capacities), and Byer (who also sued in both his official and individual capacities), move to dismiss Plaintiffs Complaint the same five theories as the Supreme Court Justices. In addition, they also move to dismiss Plaintiffs complaint on two additional grounds: the application of res judicata and collateral estoppel, state tort claim immunity.

In Case No. C07-0301, Bloom, Sperber, Werchick, McF Byer and Magnuson (all of whom are sued in their offici

l States District Court
the Northern District of California

individual capacities) and the State Bar of California move dismiss

Plaintiffs Complaint on eight grounds: (1) *Young* abstention, (2) Eleventh Amendment immunity, judicial immunity, (4) failure to state a claim under Section 1983, (5) state tort claim immunity, (6) arbitral immunity, (7) failure to state a conspiracy claim under Section 1985, and (8) state law immu for acts relating to mandatory fee arbitration procedures.

1. Eleventh Amendment Immunity.

a. The State Bar of California.

In the absence of consent, a suit in federal court against a state or one of its agencies or departments proscribed by the Eleventh Amendment. *Pennhurst State S & Hospital v.Halderman,* 465 U.S. 89. 100 (1984). The St Bar of California is an "arm of the state" for the purposes Eleventh Amendment immunity. *Hirsh v. Justices of Supreme Court of California,* 1723 F.3d 708, 715 (9th 1995); *Lupert v. California State Bar,* 761 F.2d 1325, (9th Cir. 1985). For

a state or agency that is considered arm of the stat

Eleventh Amendment bar to suit applies regardle: the nature of the relief sought. *Pennhurst,* 465 U.S 100-101.

Plaintiff contends the State Bar has consented to su virtue of its designation as a "public agency" for pur of the California Torts Claim Act, and attaches a l from the State Bar referencing the California Government Code provisions governing suits agains such public agencies.

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Plaintiffs' argument, however, conflates the pot for liability of the State Bar in state court with Ele Amendment immunity issues raised when a li sues a state in federal court. The classification State Bar as a public agency under the California Claim Act does not affect the State Bar's statu purposes fo sovereign immunity.

Accordingly, all claims against the State I California in both federal actions will be dismiss their entirety.

b. The Supreme (Justices.

Plaintiff has sued the Supreme Court Justi their official capacities in Case No. C06-05490. The of sovereign immunity bars a federal action for dan or other retroactive relief, against a state official act his or her official capacity. *Edelman v. Jordan*, 41: 651, 663 (1974); *Pena v. Gardner*, 976 F.2d 469, 47: Cir. 1992). However, the Eleventh Amendment doe bar a request for prospective injunctive relief agai

United States District Court
For the Northern District of California

state official in his or her official capacity in order a continuing violation of federal *law. Pena,* 976 F 472 n.5, *Edelman,* 415 U.S. at 664. Plaintiff cor these points in his opposition. (Opposition at 10.)

Plaintiffs Complaint in Case No. C06-05490 both monetary damages against the Supreme Justices and an injunction preventing them imposing ay discipline against [Plaintiff] or othe taking any action against [Plaintiffs] license to pr law and the updating of [Plaintiffs] public rec reflect 'no discipline in good standing[.]' (Compla & 67.) Plaintiffs' request for monetary damages a the Supreme Court Justices is barred by the Ele Amendment. To the extent that Plaintiff is se prospective injunctive relief against the Supreme Justices for a violation of federal law, such claim proceed under the Eleventh Amendment. *Id.* at However, all state law claims for relief, incl prospective relief, against the Supreme Court Ju are barred in their entirety. *Pennhurst,* 465 U.S. a

c. The Individual State Defendants.

In both Case No. C06-05490 and Case No 0301, Plaintiff has sued Byer and Magi prosecutors with the State Bar, in their officia individual capacities. In Case No. C07-0301, Pl has also sued Bloom, Sperber, Werchick, and Mc all State Bar judges, arbitrators, or

employees, in their official and individual capaciti
noted above, however, Eleventh Amen·

2 immunity barring a federal action for damages, o1
retroactive relief, extends to state officials sued

3 in their official capacities. *Hirsh,* 67 F.3d 708, 71·
Cir. 1995) (State Bar prosecutors sued in their

4 official capacity are entitled to Eleventh Amendr
immunity); *see also Hafer v. Melo,* 502 U.S. 21,

5 24-25 (1991); *Pena,* 976 F.2d at 472. Accordingl
Plaintiffs' request for monetary damages and

6 retroactive relief against all of these defendants
their official capacities is barred by the Eleventh

7 Amendment. To the extent that Plaintiff is seekin
prospective injunctive relief against these defendant

8 in their official capacities for a violation of federa
such claims may proceed under the Eleventh

9 Amendment. *Edelman,* 415 U.S. at 664; *Pena,* 9'
F.2d at 473 n.5. However, all state law claims for

10 relief, including prospective relief, against the:
defendants in their official capacities are barred in t

11 entirety. *Pennhurst,* 465 U.S. at 106.

12The Eleventh Amendment does not implicate Plair
claims against these defendants in their

13 individual capacities. *Pena,* 976 F.2d at 472.

142. **The *Rooker-Feldman* doctrine.**

ed States District Court
r the Northern District of California

15 Defendants argue that this Court lacks jurisdictio
Plaintiff's Complaint under the *Rooker-*

16 *Feldman* doctrine. This doctrine applies in "ca
brought by state-court losers complaining of inju

17 caused by state-court judgments rendered befor
district court proceedings commenced and invitir

18 district court review and rejection of those
judgments." *Exxon Mobil Corp v. Saudi Basic Inc*
Corp.,

19 544 U.S. 280, 283 (2005). "Under *Rooker-Feldr*
lower federal courts are without subject matte

20 jurisdiction to review state court decisions, and
court litigants may therefore only obtain federa

21 review by filing a petition for a writ of certiora
the Supreme Court of the United States."

22 *Mothershed v. Justices of the Supreme Court,*
F.3d 602, 606 (9th Cir. 2005). In the context of

23 challenges to attorney disciplinary matters, a dis
courts have subject matter jurisdiction over gener

24 challenges to state bar rules, which do not requ
review of a final state court judgment in a particul

25 case. *Id.* at 606-07. However, district courts la
subject matter jurisdiction over challenges to sta

26 court decisions in particular cases arising out
judicial proceedings, even if the challenge is to tl

27 ———————————

McElroy is a State Bar Court Hearing J
Bloom and Sperber are attorneys with t
State Bar's Office of
Mandatory Fee Arbitration and are the bar
employees responsible for handling the arbitra
ent'orcement action against Allegrino. Werchic
the Presiding Arbitrator for the State Bar's
Mandatory Fee Arbitration Program.

constitutionality of the state court's action. *Id* at 60

Supreme Court's decision in S.B.C. No. 02
13815 denying his petition for review and
suspending him
from the practice of law until he complied
certain enumerated requirements. In his
Opposition to
Defendants' Motions to Dismiss in Case
C06-05490, Plaintiff expressly states th
"seeks a
review of the Decision in Case 02-0-13815
(Opp. at 1.)[3] This is precisely the type of
challenge that
falls within the ambit of the *Rooker-Feld*
doctrine. *See id.* at 607-08. Consequently
the extent
that Plaintiffs claims request that this Co
review or otherwise reverse the California
Supreme Court's

decision in S.B.C. No. 02-0-13815, the Cc
finds that it does not have jurisdiction to
consider such

claims.'

***Younger* abstention.**

Subject matter jurisdiction pursuant to th
Younger doctrine. Under the *Younger* doctrine
"abstention in favor

g of state judicial proceedings is required ifthe st
proceedings (1) are on-going, (2) implicate importa

state interests, and (3) provide the plaintiff an
adequate opportunity to litigate federal claims."
Hirsh v.
4) *Justices*
4L, 17 *v. Justices of the Supreme Court,* 67 F.3d
712 (9th Cir. 1995).

it was pending at the time the federal acti
was filed, regardless of whether it has sin
concluded

during the pendency of the federal action.
Beltran v. State of California, 871 F.2d 77
782 (9th Cir.

21 1988); *Canatella v. State of California,*
F.3d 843, 850 (9th Cir. 2002). "Where *Youn*

abstention

is appropriate, a district court cannot refu
abstain, retain jurisdiction over the action,
render a

decision on the merits after the state proceedings have ended. To the contrary, *Younger* abstention

requires dismissal of the federal action." *Beltran,* 781 F.2d at 782. In California, sta disciplinary

---

defendants, in connection with S.B.C. 02-0-13815. Nonetheless, for purpose analyzing the overall injunctive relie sought by Plaintiff, this Court finds it necessary to consider the *Rooker-Feldman* doctrine.

action, the *Rooker-Feldman* doctrine does bar injunctive relief relating to that action

proceedings are commenced, for purposes of *Yo*
abstention, once the accused is served
notice of disciplinary charges. *Canatello*
California, 304 F.3d 843, 851 (9th Cir. 2

and January 17, 2007 respectively, the
proceedings in S.B.C. No. 04-0-12846 were
ongoing as the State
Bar Court Hearing Department had alrea
issued its decision on November 22, 2005,
the matter
was pending before the State Bar Court R
Department. Thus, as to the first prong, th
disciplinary
proceedings in S.B.C. No. 04-0-12846 ag
Plaintiff were "ongoing" for purposes of
Younger
abstention.5

disciplinary proceedings strongly implicate
important state interests, and that under
California law,
federal constitutional defenses may adequa
be raised through judicial review of State E
Court

decisions, thereby satisfying the second and factors. *See Hirsh*, 67 F.3d at 711; *Canatella State*

of California, 304 F.3d 843, 850 n.7 (9th Ci 2002).

Younger abstention is inapplicable because did not, and will not, have an adequate opportunity to litigate.
Circuit indicated that lallthough a federal co normally required to abstain if the three pro

the *Younger* test are satisfied, abstention i

inappropriate in the 'extraordinary

circumstance' that the

state tribunal is incompetent by reason of l

67 F.3d at 713 (citing *Gibson v. Bertyhill*, 4

U.S.

564, 577-79 (1973)). However, in response motion to dismiss, "one who alleges bias m

overcome a presumption of honesty and

integrity in those serving as adjudicators.'

(quoting

Nenneally v. Lungren, 967 F.2d 329, 333 (9

Cir. 1992)).

Here, Plaintiff avers that Defendants are biased "s that they can not conduct the fair, impartial

hearing required if Plaintiff is to be afforde due process of law guaranteed by the Constitution of

the United States." (Plaintiffs Opp. at 18:9 However, the Court has reviewed both of Plaintiffs

complaints, and the allegations of bias cont therein go almost exclusively to the alleged and

---

5 it is not clear to the Court from the whether any proceedings in S.B.C. No 13815 wereongoing" for purposes of *Younger* abstention as of September 2006. However, as noted above. Plaintiff unambiguously indicated at oral argument that h abandoning all claims for relief in connection with No. 02-0-13815.

retaliatory motives of Defendants Byer and Magnuso
State Bar prosecutors. *(See. e.g.*, C06-05490
Complaint at 111139, 92, 94: C07-00301
Complaint at 1164-67.) Plaintiff alleges
facts that, if true,
would show bias on the part of the Califor
Supreme Court justices. Moreover, Plaint
threadbare
allegations regarding bias of the State Ba
Court judges, even if true, would be insuff
to overcome
the presumption of honesty and integrity
applies to these adjudicators. Plaintiffs
allegation that
State Bar judges have incentive to find
against him because if he prevails the St
Bar must pay his

costs, and that the majority of the State E
funding comes from member dues (06-54

Complaint

at 111149-50) are insufficient to establish impermissible financial interest, given th salaries of the

Bar Court judges are set by statute and not dependent on the outcome in individ cases. *Hirsh*,

67 F.3d 708 (fact that fines imposed in Cali attorney disciplinary proceedings are paid t State

Bar treasury does not establish an impermissible financial interest sufficient trigger bias exception

to *Younger* abstention). Plaintiffs allegation the

State Bar hearing judge never ruled on cert pre-

hearing motions (C06-05490 Complaint at is not sufficient to establish that the State court is

incompetent by reason of bias.' Finally, th that Plaintiff filed complaints against the State Bar

prosecutors (C06-05490 Complaint at 46), which Plaintiff contends gives the State B incentive to

find him culpable to protect its reputation, is an insufficient allegation to overcome the presumption (" honesty and integrity that applies to State Bar adjudicators.'

Accordingly, Plaintiff's allegations are insufficient to establish that this case pre the "extraordinary circumstance" in which eith State Bar Court or the California Supreme could be considered incompetent by reason of bias. Accordingly, the Court finds that Plaintiff ha adequate opportunity to litigate his federal claims in forums for purposes of *Younger* abstention. Because judicial proceedings were ongoing in S.B.C 04-0-12846 as of the date this federal actio was commenced, which implicate important st

interests, and in which Plaintiff has an adequate

opportunity to litigate his federal constitutic challenges, this Court finds that abstention appropriate

'Moreover. Plaintiff himself alleges that the

judge took into account and was critical record prosecutor's conduct, further underminin Plaintiff's conclusory assertions of bias. (C 05490 Complaint at 14,127-28.)

7 *Hirsh* appears to require a plaintif alleging bias to prevent *Younger* abstention to come forward with evi at the motion to dismiss stage to over the presumption of honesty and integ that applies to those serving as adjudicators.

28 67 F.3d at 713-14. However, the Cour need not reach the issue of evidenti proof as Plaintiff's allegations of bia alone are insufficient to overcome the presumption.

1 with respect to any injunctive relief th
would interfere with that proceeding.

2 Based on this Court's finding tha
both *Younger* abstention and *Rooker-Feldm*
apply here, the Court concludes that it is
not have jurisdiction to grant any of the
injunctive relief requested by Plaintiff
against the moving defendants in either
action. Plaintiff requests the following
injunctive relief.

Similarly, Plaintiff requests the followin

preliminary injunctive relief in his Motion For
Preliminary

1. "Preventing [Defenda
from transmitting any recommendatio
discipline whatsoever to the California Supreme
against Allegrino in State Bar Number 04-0-128
otherwise disciplining Allegrino for reasons conn
with Case number 04-0-12846 or the filing of
Action or the Justice of California Supreme Cou
Ronald M. ueorge, tniet Justice 01 1 ne Calif
Supreme Court, from imposing such discipline or

taking any adverse action against probation or Alle
suspension which is due to terminate on or about
' 2 02-0-13815 or retaliating aga
Anthony J. Allegrino II for filing this Action
way such as the filing of additional disciplinary ch
(Plaintiff's Motion at 1:6-10.)

11

Rooker-Feldman doctrine by being inextricably intertwined with the decisi the California Supreme Court in the S.B No. 02-0-13815 disciplinary matter, or bc **Plaintiff *Claims*** to the extent they se any form of injunctive relief against the moving Defendants, and on that basis de Plaintiff's motion for a preliminary injunc

Quasi-judicial immunity for state bar prosecutors in Case No. 06-5490.

The only portion of Plaintiff's claims agains Byer and Magnuson in Case Nos. 06-5490 that potentially remain viable in fight of the considerations discussed above are his claims for monetar damages against these two state bar prosec in their individual capacities. However, qua judicial immunity renders Byer and Magnuson imm from monetary damages in this matter. It is established law that California State Bar prosecutors ha quasi-judicial immunity from monetary dan

relating to disciplinary proceedings.

The only portion of Plaintiff's claims in Case No. 07-0301 that potentially remain viable in li a

of the considerations discussed above are l claims

for monetary damages against Byer, Magn Bloom, Sperber and Werchick in their indiv capacities. Though it appears likely to the (that

quasi-judicial immunity (for Byer and Magnuson) and arbitral immunity (for Bl Sperber and Werchick), or other grounds r by Defendants, will require dismissal of suc monetary claims, the Court is concerned tha Plaintiff may not have had adequate opportu to be heard with respect to theseissues, as it appears from the record that Plaintiff was r validly served with the motion to dismiss in No. 07-0301. The proof of service attached to Defe motion to dismiss in Case No. 07-0301

reflects only e-mail service. (Docket No. 3.) However, nothing in the record indicates tl Plaintiff consented to service through

electronic means, and the case had not be designated for E-filing.

Because the Court will grant the motions to dismiss brought in C06-05490 in their entirety for the reasons set forth above, the Court does not reach additior grounds raised by the moving Defendan that action, including res judicata and collate estoppel, state tort claim immunity, and t definition of "persons" for purposes of Sect 1983 liability.

Plaintiff indicated at oral argument that he h
actually received service of the Motion.
Accordingly, valid service does not appear
have been effected under Federal Rule of
Procedure
1 5(b)(2)(D) or 5(b)(3).

Unlike the grounds for dismissal
analyzed above, arbitral immunity was not
raised in connection with the motions to
dismiss filed in Case No. 06-5460 (with w
Plaintiff was served and to which he
responded). Although quasi-judicial
immunity was raised in Case No. 06-546
the Court is not confident that Plaintiff h
had an adequate opportunity to address
whether such immunity would bar recove
damages against Byer and Magnuson fo
their alleged conduct in connection with
arbitration fee award. Plaintiff has also
had a chance to respond to other alleged

grounds for dismissal in C07-00301 that bear on these damages claims, including tort claim immunity, state law immunity for relating to mandatory fee arbitration procedures. failure to state a claim under Sections 1983 anc

Accordingly, the Court will permit Plaintiff an opportunity to submit an opposition to the motion dismiss in Case No. 07-00301 that addresses t viability of his claims for damages against the defendants in their individual capacitie including but not limited to the issues o quasi-judicial immunity and arbitral immunity.

CONCLUSION

For the foregoing reasons, the Court order follows:

(1) The Court **GRANTS** Defendant Justices

of the California Supreme Court and Chief Justice

Ronald M. George's Motion to Dismiss in Cas

06-

05490 (Docket No. 57).

(1) The Court **DISMISSES** their entirety all claims against these defendants.

(2) The Court **GRANTS** Defenda State Bar of California, Ronald Magnuson Timothy Byer's Motion to Dismiss in Case N 06-05490 (Docket No. 55). The Court **DISMI** in their entirety all claims against these defendar

(3) The Court **DENIES** Plaintiff Anthony J. Allegrino II's Motion for Preliminary Injunction in Case No. 06-5490 (Docket No. 49).

(4) The Court **GRANTS IN PART** Motion to Dismiss brought by Defendants Sta Bar of California, Alan Bloom, Jill A. Sperber, Ar Wer hick, Pat McElroy, Timothy G.

BEST AVAILABLE COPY

(a) The Court **DISMISSES** in their entirety all cla
against Defendant State Bar of California.

(b) The Court **DISMISSES** in their entirety all clai
asserted against Defendants Alan Bloom, Jill A.
Sperber, Aren Werchick, Pat McElroy, Timothy G.
and Ronald E. Magnuson in their official capacities

(c) The Court finds that *Rooker-Feldman* and *Your*
abstention prevent it from issuing any of the injunc
relief requested in Case No. 07-00301.

Plaintiff shall have fourteen (14) days from the date
entry of this Order to file an opposition to Defendants'
motion to dismiss in Case No. 07-00301 addressing the grou
asserted for dismissing his federal and state law claims for
monetary damages against Defendants Alan Bloom, Ji
Sperber, Aren Werchick, Pat McElroy, Timothy G. I
and Ronald E. Magnuson in their individual capacit
Defendants shall file their reply, if any, no later tha

United States District Court
For the Northern District of California

seven (7) days after service of Plaintiff's opposition. further hearing will be permitted unless ordered by Court.

"S/MARTIN JENKINS"

MART J. JE
UNITED STATES DISTRICT J

Appendix K

Anthony J. Allegrino II
State Bar Number 200905
P.O. Box 7497
Newburgh, New York 12550

t g' SUPREME COURT OF

CALIFORNIA

In The Matter Of Anthony J. Allegrino II, A Member Of The State Bar	(;:ov Case No.: No. S132789) Declaration of Linda Giordano

I, Linda Giordano, hereby state:

1. I was previously employed *as* a legal assistant for Anthony Allegrino and was involved in a State Matter, which is Case Number S132789, which

now before this Court, in 2004.

2. In April 2004, I was contacted by a Prosecutor frc State Bar of California who identified himsel "Timothy Byer".

3. In April 2004, Timothy Byer made various threa the effect that if I appeared at the State Bar t testify for Anthony Allegrino then I would be subjected to perjury charges for testifying fal

4. In April 2004, I received numerous telephone cal made to both my place of employment, residence, and cell phone from Timothy Byer concerning threats of "penalty of Perjury" charges should I appear t testify for Anthony Allegrino at the State Bar.

5. I did speak with Timothy Byer on more tha occasion briefly and Mr. Byer did threat with "penalty of perjury" charges should appear and testify for Mr. Allegrino whi threats were completely without justifica

6. Mr Byer made such threats before allowing explain anything and in an attempt to bully and intimidate me with his position "Prosecutor" when I spoke with hi on phone in April 2004.

7. I employed as a retail manager for Ver Inc., in Central Valley, New York.

8. I informed Timothy Byer in April 2004 I did want to be contacted at work and tha I w call him back to discuss the Matter but M

Byer continued to contact me at y place (employment as I had asked him not to (a very harassing and intimidating fashi(

9.

Mr. Byer contacted me at my place of employn he left messages with my sta to the effect he was a "Prosecutor" and that I should " him immediately"

10. The calls by Mr. Byer to my place of employment and numerous messages lef with m employees after I had asked him ı do so were harassing and intimidating in and meant to deter me from appearing : the State Bar to testify for Mr. Al grino.

I, Linda Giordano, hereby state under pena perjury under the laws of the State of Californi the Unit States of America that the Statement's and contained in this Document are true to the b my knowledge and belief.

Dated: June 2, 2005
"S/LINDA GIORDANO"

Linda Giordano **BEVERLY L. MANISCALCO**
Notary Public, State of New York
No. 01MA6075254
Qualified In Orange County
Commission Expires: 613/06

the undersigned, personally

appeared,Linda Giordano, personally known to m
proved to me on the basis of satisfactory evidence
the individual(s) whose name(s) is (are) subscribe
the within instrument and acknowledged to me th
he/she/they executed the same in his/her/their
capacity(ies) and that by his/her/their signature(s)
the instrument, the individual(s), or the person up
behalf of which the individual(s) acted, executed t
instrument.

"S/BEVERLY MANCUSO"

Notary Public

Appendix L

Appendix D

]

REVIEW DEPARTMENT OF THE STATE I

COURT

IN BANK

In the Matter of	) 04-0-1
ANTHONY JOSEPH ALLEGRINO II,	) ORDI
Member of the State Bar.	

The request of respondent Anthony Joseph

Allegrino II for reconsideration, filed May 3, 2007,

and the State Bar's request to designate for public

the opinion on review in this matter filed on

April 18, 2007, are denied.

Case No.: 04-0-12846

Anthony
J. Allegrino II (SBN 200905) P.M.B #149
367 Windsor Highway
New Windsor, New York 12553

For Petitioner:

THE STATE BAR COU

REVIEW DEPARTMENT — LOS ANGELES

Judge
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Review
Departm

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PLEASE TAKE NOTICE in the above-entitled Co with no appearance required, located at 1149 Sout Street, Los Angeles, California 90015 before the Re Department of this Court that Petitioner, Anthony Allegrino II, hereby moves for:

1. An Order pursuant to Rule 309(a) of the Sta Bar reconsidering and vacating the Decisi Case Number 04-0-12846;
2. An Order pursuant to Rule 309(a) reconsider and vacating and/or staying suspension pending reconsideration or appeal in this Court or to the California

Supreme Court;

3. An Order pursuant to Business and Profess Code Section 6007 that the board shall terminate the involuntary inactive enroll upon proof that the attorney's conduct no longer poses a substantial threat of harm the interests of the attorney's clients or th public or where an attorney who could no located proves compliance with Section 6(

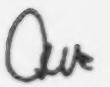
This *Motion* is based upon Petitioner's *Notice of Mc Motion*, the *Declaration of AnthonyJ. Allegrino II,* t Court files and records of this Case, and any evider presented by way of subsequent briefing, testimony oral argument.

Dated: May____ , 2007

Respe

y

subm



For P
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12553

Notice of Motion For Reconsideration

THE STATE BAR OF CALIFORNIA OFFICE OF THE CHIEF TRIAL COUNSEL SCOTT J. DREXEL, No. 65670 CHIEF TRIAL COUNSEL
RUSSELL G. WEINER, No. 94504 DEPUTY CHIEF TRIAL COUNSEL VICTORIA R. MOLLOY, No. 97747 ASSISTANT CHIEF TRIAL COUNSEL KEVIN B. TAYLOR, No. 151715 SUPERVISING TRIAL COUNSEL 1149 South Hill Street
Los Angeles, California 90015-2299
Telephone: (213) 765-1630

ANTHC
A Mem

THE STATE BAR COURT

REVIEW DEPARTMENT

In the Matter of

The State Bar of California, by and through Supervising Tı Counsel Kevin B. Taylor, hereby opposes Respondent's rr reconsideration or vacating of opinion on review. The Stat submits that Respondent has failed to set forth any facts or to justify reconsideration of or vacating of the opinion on Respondent has also failed to demonstrate good cause for termination his inactive enrollment. Accordingly, the State

) Case No. 04-0-12846

) **STATE BAR'S OPPOSITION TO)**
RESPONDENT'S MOTION FOR
) RECONSIDERATION AND FOR STAY) OF
INVOLUNTARY INACTIVE)
ENROLLMENT; MEMORANDUM OF)
POINTS AND AUTHORITIES;)
DECLARATION OF KEVIN **B.)** TAYLOR;
EXHIBITS

) [Filed concurrently with Evidentiary
) Objections to Declaration of Anthony J.)
Allegrino, II1

MEMORANDUM OF POINTS AND AUTHORI

I. INTRODUCTION.

Respondent's motion seeks to have this Cou reconsider and/or vacate its April 18, 2007 Opinio Review recommending Respondent's disbarment, a well as vacate or stay his inactive enrollment, pen the outcome of the within motion or a petition to t California Supreme Court. His motion, however, fa set forth any facts to justify the relief requested, a should be denied in its entirety.

As discussed below, Respondent's motion, a particular his own declaration in support of his mo contains no new or different facts, or circumstance law, or that the Opinion on Review contains any er of fact or law to establish that he is entitled to reconsideration pursuant to rule 309(a), *Rules of*

Procedure of the State Bar ofCalifornia (hereinafte *"Rules of Procedure").* Moreover, Respondent has f to set forth any facts or reasons that his involunta inactive enrollment pursuant to *Business and Professions Code,* section 6007(c)(4) should be stay vacated.

II. RESPONDENT'S MOTION FAILS TO SET FORTH ANY GROUNDS FOR RECONSIDERATION OF THE OPINIO REVIEW.

Rules of Procedure, rule 309(a) provides for reconsideration of decisions or rulings of the Revie Department, but does not set forth the requiremen a grant of reconsideration. Rule 224, however, whi applies to reconsideration of decisions and rulings the Hearing Department is explicit:

> "(b) The grounds for a motion reconsideration are (1) new or diff facts, circumstances or law, as that gr

is applied in civil matters under C

Civil Procedure section 1008; and

(2) the order or decision contains one or more err
fact and/or

'Concurrent with this opposition, the Stat
has filed evidentiary objections to Respon
declaration in support of his motion. As demons
by those objections, Respondent's motion is pre
entirely upon inadmissible factual and
conclusions without any supporting foundation.

law based on the evidence already be
the Court."

"[S]trong reasons should be put forward for seeking to relitigate an issue already fully litigate decided on a prior appeal." *(In the Matter of Heine* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 559 564). Likewise, strong reasons should be put forwa for seeking reconsideration of an opinion on review

Respondent's motion for reconsideration fails set forth any new facts or issues, nor does it establ that the Opinion on Review contains any error of fa law.

Analyzed under the provisions of rule 224(b), clear that Respondent's motion is woefully deficien The grounds raised for reconsideration in Respond motion are his bald assertions (1) he did not receiv certain documents during the Review Department

phase of this case, and (2) that he filed his own tir notice of request for review. Neither of these contentions are supported by any facts. The only evidence submitted in support of Respondent's mo is his own declaration, which is little more than ai inadmissible restatement of his unsupported contentions and conclusions.

Respondent's contention that he did not rece pleadings and orders pertaining to the State Bar's request for review of the Hearing Department's November 22, 2005 decision is specious and belied the evidence. First, all of the pleadings and orders review, beginning with the State Bar's December 2 2006 Request for Review and ending with the Revi Department's April 18, 2007 Opinion on Review, w properly served on Respondent's official State Bar membership records address.

Attached to the Declaration of Kevin B. Tayl Exhibit "1" and incorporated herein is a certified c

of Respondent's State Bar membership records ad history. A comparison of the proofs of service of th State Bar's pleadings filed in the Review Departm and the Review Department's orders in this matte establish that they were properly served on Respondent's official State Bar membership addre required.

For this Court to accept Respondent's conter that he never received the State Bar's pleadings o Court's orders, it would necessarily have to conclu that either Respondent failed to keep his members address updated or that both the State Bar and th Review Department

filed pleadings and orders with false proofs of serv
The first conclusion would not entitle Respondent
reconsideration as his failure to receive the docum
would have been the result of his own neglect. Th
second conclusion is simply implausible and not
supported by any facts.

The more likely scenario is that Respondent
received the pleadings and orders served upon hir
This conclusion is supported not only by the proofs
service on the pleadings and orders and Responde
membership address history, but by his own state
in his motion and declaration.

For instance, Respondent claims that he file
timely notice of request for review "with the State
and has not heard since late 2005 about this case.
Respondent's Motion, pg. 2, lines 7-8; and Declarat

of Anthony J. Allegrino, II, para. 1, lines 18-21). Respondent's statement demonstrates his knowle and therefore his notice of the State Bar's Request Review. Otherwise, Respondent could not declare his alleged request for review was contemporaneo with the State Bar's.

Respondent also contends and declares that has never received any "briefs or transcripts." (See Respondent's Motion, pg. 2, lines 4-5; and Declara of Anthony J. Allegrino, II, para. 1, lines 18-21). Respondent's choice of words is significant. He doe say that he did not receive any pleadings or orders that he did not receive any briefs or transcripts. Tl Respondent was on notice of the pendency of the Review Department matter. However, Respondent not allege that he made any attempt to contact the Office of Chief Trial Counsel or the Court regardin status of the case, nor could he because he made n such inquiries.

Lastly, Respondent's knowledge and notice o
Review Department matter is established by his f
of the instant motion. In order for Respondent to f
motion for reconsideration, he must have first knc
the Opinion on Review, which required his receipt
the opinion. Thus, there is no doubt that Respond
received the Opinion on Review. The opinion was
served on Respondent's current official State Bar
membership address: 367 Windsor Hwy, PMB 149
New Windsor, NY 12553. This is the same address
the Court's

December 19, 2006 Thirty Day Notice of Time and Place of Review Department Oral Argument and t State Bar's January 4, 2007 Substitution of Couns was served.

Thus, Respondent has failed to prove th he did not have notice of the within proceedin Respondent's motion should be denied to the exten that it relies on this contention.

Respondent's second ground asserted for reconsideration is his contention, without any fact support it, that he also filed a timely request for re which apparently was ignored or forgotten by the Court. Respondent's claim is unconvincing ar should be rejected. Respondent has not attached his motion or otherwise produced a conformed, or u conformed copy for that matter, of his alleged requ

for review. It is significant that in his motion Respondent only asserts that he filed his request f review "with the State Bar," and does not provide date he filed and served his request.

As stated previously, Respondent's contenti that he "filed" a request for review is a contention the Court misplaced or neglected his request, whic extremely unlikely. For these reasons, Respondent unsupported contention that he filed his own requ for review is without merit and should be rejected.

III. RESPONDENT HAS FAILED TO DEMONSTRATE THAT HE IS SHOULD HAVE HIS INVOLUNTARY INACTIVE ENROLLMENT VACATED OR STAYED

The second portion of Respondent's motion s an order staying or vacating this Court's order tha enrolled Respondent involuntarily inactive pursua *Business and Professions Code*, section 6007(c)(4) a rule 220(c), *Rules of Procedure*. Though he is not

explicit, it appears that Respondent requests relie
his involuntary inactive enrollment pursuant to s
6007(c)(5).

The State Bar respectfully submits that Respondent has failed to provide any proof that hi "conduct no longer poses a substantial threat of h the interests of the attorney's clients

or the public, as required by section 6007(c)(5).2

As discussed previously and set forth in det the State Bar's concurrently filed evidentiary objections to Respondent's declaration, Respondei not provided this court with admissible evidence t support his motion. Respondent's motion and declaration are little more than unsupported and irrelevant conclusions and assertions.

For instance, Respondent's motion and declaration simply assert, without any facts, that l does not pose a substantial threat to the public. (S Respondent's Motion, pg. 3, lines 22-23; and Declaration of Anthony J. Allegrino, II, pg. 2, para. 6). Respondent's remaining conclusions a assertions are equally irrelevant and baseless.

IV. CONCLUSION.

For the reasons set forth above, the State B
respectfully submits that Respondent has failed t
provide sufficient facts or reasons to grant
reconsideration of the Opinion on Review, or to st
vacate his involuntary inactive enrollment.
Accordingly, the State Bar respectfully requests t
Respondent's motion be denied in its entirety.

Respectfully submitted,
Dated: May 14, 2007

THE ST

2007

BY: _____
KEVIN B. TAYLOR

BAR OF
CALIFO
OFFICE
THE CH
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COUNSE

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[2] The State Bar also questions whether section 6007(c)(5) applies to a respondent enrolled involuntarily inactive pursuant to section 6007(c)(4) and whether Respon entitled to seek relief through it.

DECLARATION OF KEVIN B. TAYLOR

I, KEVIN B. TAYLOR, declare as follows:

1. All statements made herein are bas
my personal knowledge, except for those stated tc
under information and belief.

7. I am an attorney admitted to all cou
the State of California. I am employed as a
Supervising Trial Counsel in the Office of the Chi
Trial Counsel of the State Bar of California and h
served in said capacity at all times relevant heret

3 Attached hereto as Exhibit "1" is a
certified copy of the address history of Anthony J.
Allegrino, II (no. 200905) on file in the Membershi
Records Department of the State Bar of California

I declare under penalty of perjury under the
laws of the State of California that the foregoing is

and correct.

Executed on May14 , 2007, at Los Angeles California.

"S/Kevin Taylor"

May 9, 2007

TO WHOM IT MAY CONCERN:

I, Kathy Lambert, Custodian of

Membership Records of the State Bar of

California, hereby certify that attached is a full, true and correct copy of the address history of ANTHONY JOSEPH ALLEGRINO, II, #200905 on file in the Membership Records Department of the State Bar of California, from June 1, 1999, to the date of this certificate.

THE STATE BAR OF CALIFORNIA

Kathy Lambert
Custodian of Membership Records

Eff: 9/05/20(

6/15/200

Member #: **200905**

2/09/200

Date of Admission: **6/01/1999**

Status:

1/25/200:

Not Eligibl Effective: **4/21/2007**

Name: **Anthony J. Allegrino II**

1/20/200·

Address:

367 Windsor Hwy PMB 149
New Windsor

7/02/200:

NY 12553

PO Box 7347 Newburgh NY 12550 10/07/2002

PO Box 7497 Newburgh NY 12550 9/20/2002

PO Box 7347 Newburgh NY 12550 6/01/1999

Law Ofc Anthony J Allegrino II

1001 Maggie Dr
Newburgh NY 12550
1001 Maggie Dr Newburgh NY 12550

20 Ramblewood Dr Newburgh NY

12550

7825 Fay Ave #200 La Jolla CA 92037

9 Roundtree Ct Beacon NY 12508

Appendix E

— LOS ANGELES Case
In The Matter Of

Anthony J. Allegrino II,

A Member Of The State Bar

R
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S
T FOR REVIEW

Judge : Robert M. Talcott
Department: Hearing
Complaint Filed: December 14, 2004
Heard: May 9 — May 12, 2005

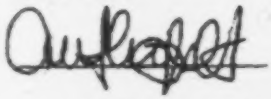
RESPONDENT hereby requests review

pursuant to Rule 301 of Title II of the Rules

of Procedure of the State Bar of California

of the Hearing Department filed in the

above-entitled matter on November 22, 2005.



Anthony J. Alle

Dated: December 18, 2005

Anthony J. Allegrino
State Bar Number 200905 P.O. Box 7347
Newburgh, New York 12550

THE STATE BAR COURT

HEARING DEPARTMENT — LOS ANGELES

Case No.: No. 04-0-12846

Proof of Service

In The Matter Of

Anthony J. Allegrino

A Member Of The State Bar

I, Linda Giordano, hereby state:

1. I am not a party to this Action; and

2. I am over the age of 18 years; and

3. I reside at 606 Union Avenue, New Windsor, New York 12553;

On December 18, 2005, I served the following Documents:

1. Request for Review

By Placing A True Copy Of These Documents In An Envelope, Sealing This Envelope, And Depositing This Envelope With the United States Postal Service Or In A Depository Owned And Controlled By the United States

Postal Service

For Delivery With All Fees Paid And

Addressed To:

Timothy Byer, DTC
State Bar of California
1149 South Hill Street
Los Angeles, California

State Bar of California
1149 South Hill Street
Los Angeles, California

I, Linda Giordano, hereby state under penalty of perjury under the laws of the State of California and the United States of America that the Statement's above and contained in this Document are true to the best of my knowledge and belief.

Dated: December 18, 2005

"S/LINDA GIORDANO"

Appendix F

From: Magnuson, Ronald
Tuesday, May 03, 2005 3:44 PM
To: Timothy Byer
The Allegrino Evidence "problem"

At Evidence Code section 1402 which

provides for authentication of altered

writings (even when the alteration is material to the question in issue) if the

party offering it accounts for the alteration

either by testifying it was made without his

concurrence or was made with the concurrence

of the affected parties or is otherwise

innocently explained or material because

it did not change the meaning or language

of the document. In any case, the alteration only becomes material when

the document is offered into evidence.

Ronald E. Magnuson

Appendix G

THE STATE BAR OF CALIFORNIA OFFICE OF THE CHIEF TRIAL COUNSEL SCOTT J. DREXEL, No. 65670 CHIEF TRIAL COUNSEL RUSSELL G. WEINER, No. 94504 DEPUTY CHIEF TRIAL COUNSEL VICTORIA R. MOLLOY, No. 97747 ASSISTANT CHIEF TRIAL COUNSEL TIMOTHY G. BYER, No. 172472 DEPUTY TRIAL COUNSEL
1149 South Hill Street
Los Angeles, California 90015-2299 Telephone: (213) 765-1325

THE STATE BAR COURT

REVIEW DEPARTMENT - LOS ANGELES

In the Matter of ANTHONY J. ALLEGRINO No. 200905, A Member of the State Bar.	) **Case No. 04**)) **REQUEST**)) **[Rule 301, R**)))

THE STATE BAR OF CALIFORNIA, by and through Deputy Trial Counsel TIMOTHY G. BYER,

hereby requests review, pursuant to rule 301 of Title II of the Rules of Procedure of the State Bar of California, of the Decision of the Hearing Department filed in the above-entitled matter on November 22, 2005.

The undersigned Deputy Trial Counsel certifies that a trial transcript of the Hearing Department proceedings held in this matter has been ordered from the State Bar Court. A copy of the Transcript Order Form submitted to the court is attached as Exhibit "1" hereto.

The undersigned Deputy Trial Counsel also certifies that payment of the cost of the transcript prepared in conjunction with this Request for Review has been authorized and will be paid upon notification by the Clerk of the State Bar Court of the amount assessed.

Respectfully submitted,

THE STATE BAR OF CALIFORNIA OFFICE OF THE CHIEF TRIAL COUNSEL

Dated: December 23, 2005 "S/TIMOHY BYER"

Appendix H

THE STATE BAR OF CALIFORNIA OFFICE C
1149 SOUTH HILL STREET, LOS ANGELES, CC
CALIFORNIA 90015-2299

July 1, 2005

Anthony J. Allegrino, 1001 Maggie Dr.
Newburgh, NY 12550

RE: Inquiry Number: 05-7402
Respondent: Ronald E. Magnuson
Timothy G. Byer

Dear Mr. Allegrino:

Your complaint against Ronald E. Magnuson and Timothy G. Byer, received on May 9, 2005, has been reviewed by a staff attorney to determine whether they violated the State Bar Act and/or the Rules of Professional Conduct and whether there is a basis for investigation for prosecution of the alleged conduct.

We have received your June 9, 2005, letter responding to our request for additional information which not only provided the requested information but also

provided additional allegations. We have determined to assign the complaint against attorney Byer to a Special Deputy Trial Counsel for further revicw and investigation. (See Rules Proc. of State Bar, rule 2201.)

After careful review and after taking into consideration all relevant factors, the State Bar has concluded that the complaint against attorney Magnuson does not warrant action. You complained that the attorney, a State Bar prosecutor, assisted another prosecutor (attorney Byer) in altering evidence to be submitted to the State Bar Court in a disciplinary proceeding against you. The only facts to support the allegation is a copy of an e-mail message from attorney Magnuson to attorney Byer advising as to the application of Evidence Code section 1402. Although you interpret the e-mail to evidence an improper motive, the e-mail does not provide evidence of such a motive. The State Bar must prove allegations of attorney misconduct with clear and convincing evidence, and we have determined that allegations are not supported by sufficient facts to warrant investigation and would not lead to a viable prosecution. We are closing our file on the complaint against attorney Magnuson at this time.

If you do not agree with the decision to close your complaint against attorney Magnuson, you may

Very truly yours,

"S/D.C. Daphene
Supervising Trial Counsel

request a review, **in writing, within three (3) months** of the date of this letter. Telephonic requests cannot be accepted. Include with your request any additional or new evidence and **Copies** of documentation which you believe should be considered. You may make your written request to: Audit and Review, Office of the Chief Trial Counsel, State Br of California, 1149 South Hill Street, Los Angeles, California 90015.

tumid Magnnson is the State Bar of California Attorney prosecuting a Case 040-12846 against me which is entirely without merit. Furthermore, Ronald Magnuson has engaged in conduct which is in violation Of the Rules of Professional Responsibility, Specifically 5-220, Suppression of Evidence, anclhas committed crimes of moral turpitude for

falsifying evidence, submitting such evidence to the State Bar Court in Los Angeles in my proceeding, and assisting the complaining witnesses in committing perjury, which acts are in violation 'of California Penal Code Section's 132, a felony, 134, a felony, and 135, a misdemeanor.

Mr. Magnuson has admitted to the violatiOns in the Transcripts from the May 5; 2005,.
I have included the Transcripts from the proceeding, in email from Ronald Maguson, to Timothy Byer, Co Council in this Cate, attempting to justify altered evidence, and my Declaration to the Court regarding Prosecutorial

"S/ANTHONY J. ALLEGRINO II" 5-5-2005

Complaint Against Timothy Byer

Timothy Byer is the State Bar of California Attorney prosecuting a Case 04-0-12846

gainst me which is entirely without merit. Furthermore, Timothy Byer has engaged in 'conduct which is in violation of the Rules of Professional Responsibility, Specifically 5- 220, Suppression of Evidence, and has committed crimes of moral turpitude for falsifying evidence, submitting such evidence to the State Bar Court in Los Angeles in my proceeding, and assisting the complaining witnesses in committing perjury, which acts are in violation of California Penal Code Section's 132, a felony, 134, a felony, and 135, a misdemeanor.

Mr. Byer has admitted to the violations in the Transcripts from the May 3, 2005, and May 5, 2005, proceeding in State Bar Court.

I have included the Transcripts from the proceeding, an email from Ronald Maguson, to Timothy Byer, Co Council in this Case, attempting to justify altered evidence, and my Declaration to the Court regarding Prosecutorial Misconduct.

"S/ANTHONY J. ALLEGRINO II" 5-5-05